Native American Law in the Modern Era

March 10, 2016
Government Law Review Symposium
Native American Law in the Modern Era

March 10, 2016

Agenda

1:30pm – 2:00pm  Registration

2:00pm – 2:30pm  Tribal/State/Federal Interests, The Silent But Ever Present 10th Amendment

Keynote Speaker
Hon. Peter J. Herne
Chief Judge, St. Regis Mohawk Tribal Court

2:30pm – 4:10pm  Panel One – Challenging Issues
Moderator:  
Robert Batson, Esq. ‘75
Albany Law School, Government Law Center

Indian Gaming and Taxation
James T. Meggesto, Esq.’97
Holland & Knight LLP

The Law: Toolkit for Native Cultural Protection! ... Or Disruption?
Marguerite Smith, Esq. Vice Chair
First Nations Development Institute
Shinnecock Nation

Reforming Federal Indian Law to Support Tribal Economic Development
Robert Odawi Porter, Senior Advisor
Dentons
Former President – Seneca Nation of Indians

4:10pm – 4:20pm  Break
Panel Two – Changing Futures

Moderator:
Robert C. Batson, Esq. ‘75
Albany Law School, Government Law Center

Dollar General v. Mississippi Choctaw Band and the Future of Tribal Courts
Dale White, Esq., General Counsel
Tarbell Management Group and Former General Counsel – St. Regis Mohawk Tribe & Mohegan Tribe of Indians in Connecticut

Sovereign Immunity and Consent
Steven P. McSloy, Esq. General Counsel
Oneida Nation of New York
Carter Ledyard & Milburn, LLP

Federal/Tribal Government Relations
Jennifer Hughes, Esq. ‘95
Hobbs, Straus, Dean & Walker, LLP
SPEAKER BIOGRAPHIES

ROBERT C. BATSON, ESQ. '75, is Government Lawyer in Residence at the Government Law Center of Albany Law School, where he teaches classes in Federal Indian Law and State Constitutional Law. He served in various legal positions in New York State government between 1976 and 2003, where he specialized in municipal law, administrative law and government regulation. From 1978 to 1995, Batson served as a liaison between New York State and the governments of various Indian nations, and represented the State in negotiations on many issues, including land claims and gaming compacts.

HON. PETER J. HERNE is the elected Chief Judge of the St. Regis Mohawk Tribal Court. He graduated from SUNY Buffalo School of Law, is a Member of the NYS Bar Association, and has worked in both private and public practice. Chief Judge Herne has been on the bench since 2008, and prior to that he was the first member from the St. Regis Mohawk Tribe to serve as an Assistant District Attorney in Franklin County under Derek Champagne. Previous to that position, Herne practiced primarily in Criminal Defense and worked for the St. Regis Mohawk Tribal Gaming Commission. He is a Marine Corps veteran and resides on the St. Regis Mohawk Indian Reservation with his wife and two children.

JENNIFER HUGHES, ESQ. ’95, is a Partner at Hobbs, Straus, Dean & Walker, LLP. She grew up in Central New York in the heart of Iroquois Country, where she developed a lifelong interest in the history and workings of the Iroquois Confederacy. Post-college volunteering at the Paschal Sherman Indian School on the Colville Reservation and working for the US Senate Committee on Indian Affairs solidified her pursuit of a career in Indian law. Hughes graduated cum laude from Albany Law School in 1995. During law school, she clerked for the Committee on Indian Affairs and the Seneca Nation of Indians’ Department of Justice. At Hobbs Straus, she has been involved in matters affecting tribal governance and governmental relations, including negotiating intergovernmental agreements with local governments, working on self-determination contracting and self-governance issues, advocating for proper trust management of tribal resources, and advising tribes on their gaming operations. She serves as lead counsel in litigation for the validity of the Secretary of the Interior’s Class III gaming regulations. She also participates in the development of federal legislation and executive action beneficial to tribes and tribal projects, and provides legal analysis for reservation infrastructure improvement projects. She has long served as counsel for the Mni Wiconi Water Project, one of the largest U.S. water projects, located in West Central South Dakota. Hughes was a founding partner of Ayer and Hughes and, before that, practiced at Morisset, Schlosser, Ayer & Jozwiak, where she served as an associate and government-relations specialist for Indian affairs; conducted legal
analyses of federal legislative and executive actions affecting Indian tribes; and advocated for client tribes’ positions on Capitol Hill, before federal agencies, and at the White House.

STEVEN P. MCSLOY, ESQ., is a Partner in the Corporate Department of Carter Ledyard & Milburn LLP in New York City. With more than 25 years of experience, McSloy’s practice concentrates on corporate finance, including commercial lending, debt securities issuance, tax-exempt lending, workouts, joint ventures and general corporate matters. He is also one of the nation’s leading experts on Native American Law and finance and has worked on some of the largest and most complex financial transactions in Indian Country, acting as lead counsel in financing hotels, casinos, retail outlets, energy projects and municipal buildings on tribal lands. McSloy graduated cum laude from Harvard Law School and magna cum laude from New York University, where he was elected to Phi Beta Kappa. He has served as the General Counsel of the Oneida Indian Nation of New York and its Turning Stone Casino and has taught American Indian Law at Columbia, NYU, Fordham, Syracuse, Cardozo and St. John’s University Schools of Law and the California Tribal College. McSloy is a member of the bars of the United States Supreme Court, the Oneida Indian Nation and New York State, and is an elected member of the International Masters of Gaming Law.

JAMES T. MEGGESTO, ESQ., is a partner and deputy practice leader of the Native American Law Practice Group based in Holland & Knight's Washington, DC, office. He focuses his practice on legal matters involving Native American tribes, including issues involving policy and regulation, public law, tribal sovereignty, gaming and compact negotiation, project development, finance and litigation. Meggesto began his career in Native American affairs in Washington, DC, nearly 25 years ago as a staff professional at the National Congress of American Indians, focusing on intergovernmental affairs, including the first-ever White House meeting between the President and leaders from all federally recognized Indian tribes. Throughout his career, Meggesto has been devoted to the exclusive representation of Indian tribes, tribal governmental entities, and economic ventures that do business with Indian tribes. He represents Indian tribes and tribal interests nationwide and in federal, state and tribal courts as well as before Congress and federal agencies. He has argued cases in several federal district courts, multiple circuit courts of appeals, and has second-chaired two Indian law cases before the US Supreme Court. He has also argued cases in several tribal courts regarding complex matters such as gaming laws, land-into-trust matters, economic development initiatives and federal treaty rights litigation. Meggesto authored a chapter in the book EMERGING ISSUES IN TRIBAL-STATE RELATIONS: Leading Lawyers on Analyzing the Economic, Cultural, and Political Trends Affecting Tribal-State Interactions (2014 ed.).

HON. ROBERT ODawei PORTER is Senior Advisor in the Native American Law and Policy practice and the Public Policy and Regulation practice in the Washington, DC, office of Dentons. He joined the global law firm following the completion of his term as the 67th President of the Seneca Nation of Indians. A citizen (Heron Clan) of the Seneca Nation of Indians, Porter has held various positions with the Nation throughout his career, including as its chief legal counsel in the positions of attorney general and
later as senior policy advisor and counsel. His law practice focuses on complex legal and policy matters representing Indian nations, individual Indians, Indian-owned businesses and companies doing business in Indian Country. He advises his clients on protecting and asserting treaty rights, improving tribal self-governance and legal systems, and expanding tribal economic development and empowerment opportunities. Additionally, he advises on protecting tribal wealth from unauthorized taxation, enforcing Indian gaming rights, tribal tobacco regulation and defense, and public advocacy before the US Congress and agencies. Before serving as Seneca Nation President and CEO, Porter served for more than 10 years as a tenured law professor at the University of Kansas, the University of Iowa and Syracuse University. Additionally, he is the founding director of the Tribal Law and Government Center at the University of Kansas and the Center for Indigenous Law, Governance & Citizenship at Syracuse University. Porter received a JD from Harvard University School of Law and an AB from Syracuse University Maxwell School of Citizenship and Public Affairs.

MARGUERITE SMITH, ESQ., is an enrolled Shinnecock Indian, who has lived on a Reservation, in an urban Indian community, as well as in non-Native suburbia. Smith’s educational background includes graduation from New York City public schools, Smith College and NYU School of Law. She has worked in a number of different capacities for state, local, federal and native tribal governments. Most of her career has included advocacy (paid and pro bono) for rights of Native Americans, women, other people of color, and workers, as well as on behalf of cultural preservation and environmental justice. For many years, including during the Land Claim and Federal Recognition quest, Smith served as an attorney for the Shinnecock Nation. She is a long-time member of the Board of Directors of First Nations Development Institute, and its First Nations Oweesta Corporation, which supports economic growth in Native American communities through the creation, development, and capitalization of Community Development Financial Institutions. She is an incorporator of the now dormant Native American Bar Association of New York and is a past member of the Board of Directors of the national Native American Bar Association. Smith is currently engaged in private general legal practice, where she provides consultant/advisory services for the Shinnecock Indian Nation, serves as a mediator, and works with organizations to design effective dispute resolution services. She is actively involved with numerous organizations, including the New York Federal-State-Tribal Courts and Nations Justice Forum.

DALE WHITE, ESQ., is the General Counsel for Tarbell Management Group. Prior to that position, White was General Counsel for the St. Regis Mohawk Tribe and General Counsel for the Mohegan Tribe of Indians in Connecticut. For much of his career, he practiced federal Indian law in the State of Colorado, where he became a partner in an Indian-owned law firm. While in private practice, White litigated a number of cases in federal court, including arguing eight cases in the U.S. Courts of Appeals. In 1988, he had the distinction of successfully arguing an Indian law case in the U.S. Supreme Court, becoming the first member of an Iroquois tribe to appear in the Supreme Court. White’s experience also includes work in the federal government. After graduating from
Cornell Law School, he went to work in the US Department of Justice in the Indian Resources Section, where he litigated a number of cases on behalf of tribes.
Panel One – Challenging Issues

Indian Gaming and Taxation
James T. Meggesto, Esq. ‘97
Indian Gaming and Taxation Issues

1. **The origins of Indian Gaming**
   a. Indian gaming before 1988 -- bingo operations, California, Florida.

2. **The Indian Gaming Regulatory Act, 25 U.S.C. 2701 et seq.**
   a. Classes of Indian Gaming.
   b. Tribal State Compacts.
   c. State and Tribal Sovereign Immunity.
      i. Seminole Tribe v. Florida; Michigan v. Bay Mills Indian Community.

3. **Taxation of Tribal Governments engaged in Gaming**
   a. Tribal Governments are not taxable entities
   b. Tribes are not subject to federal income tax on gaming or business income.
   c. Tax treatment of tribally owned entities
      i. Federally chartered corporations
      ii. Tribally chartered corporations and instrumentalities
      iii. State law corporations
      iv. Limited Liability Companies.

4. **State Taxation issues**
   a. legal incidence of the tax.
   b. On or off-reservation transactions.

5. **Taxation of Tribal Members Receiving Distributions from Gaming**
   a. Tribal Members are generally subject to federal income tax
b. Gaming distributions received by tribal members are taxable

c. Tribe is obligated to withhold income tax and advise members of their tax liability

6. **Use of Gaming Revenues for the General Welfare of Tribal Members**

a. General Welfare Doctrine

b. Recently Enacted Statutory Exclusions for Health Care (IRC Sec. 139D) and General Welfare (IRC Sec. 139E)

7. **Deferral of Gaming Income Through Funding of Tribal Trusts**

a. Minors Trusts

   b. Deferred Per Capita Trusts. Establish tax-free Tribal Empowerment Zones on tribal lands to promote investment, job creation, and revenue generation for tribal governments;

8. **Taxation Issues Related to the Operation of Casino Gaming**

a. Withholding and Reporting on Gaming Winnings (same as for all other casinos, no special rules)

b. Employee Taxation Issues (generally the same as for any employer, except for special FUTA exemption for tribal employees)
Public Law 100–497
100th Congress

An Act

To regulate gaming on Indian lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That this Act may be cited as the "Indian Gaming Regulatory Act".

FINDINGS

Sec. 2. The Congress finds that—

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 2103 of the Revised Statutes (25 U.S.C. 81) requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

DECLARATION OF POLICY

Sec. 3. The purpose of this Act is—

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

DEFINITIONS

Sec. 4. For purposes of this Act—
(1) The term "Attorney General" means the Attorney General of the United States.
(2) The term "Chairman" means the Chairman of the National Indian Gaming Commission.
(3) The term "Commission" means the National Indian Gaming Commission established pursuant to section 5 of this Act.
(4) The term "Indian lands" means—
   (A) all lands within the limits of any Indian reservation; and
   (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.
(5) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians which—
   (A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and
   (B) is recognized as possessing powers of self-government.
(6) The term "class I gaming" means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.
(7)(A) The term "class II gaming" means—
   (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—
      (I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,
      (II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and
      (III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and
   (ii) card games that—
      (I) are explicitly authorized by the laws of the State, or
      (II) are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.
(B) The term "class II gaming" does not include—
   (i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or
(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

(C) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes those card games played in the State of Michigan, the State of North Dakota, the State of South Dakota, or the State of Washington, that were actually operated in such State by an Indian tribe on or before May 1, 1988, but only to the extent of the nature and scope of the card games that were actually operated by an Indian tribe in such State on or before such date, as determined by the Chairman.

(D) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on the date of enactment of this Act, any gaming described in subparagraph (B)(i) that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requests the State, by no later than the date that is 30 days after the date of enactment of this Act, to negotiate a Tribal-State compact under section 11(d)(3).

(8) The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

(9) The term "net revenues" means gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees.

(10) The term "Secretary" means the Secretary of the Interior.

NATIONAL INDIAN GAMING COMMISSION

Sect. 5. (a) There is established within the Department of the Interior a Commission to be known as the National Indian Gaming Commission.

(b) (1) The Commission shall be composed of three full-time members who shall be appointed as follows:

(A) a Chairman, who shall be appointed by the President with the advice and consent of the Senate; and

(B) two associate members who shall be appointed by the Secretary of the Interior.

(2) A The Attorney General shall conduct a background investigation on any person considered for appointment to the Commission.

(B) The Secretary shall publish in the Federal Register the name and other information the Secretary deems pertinent regarding a nominee for membership on the Commission and shall allow a period of not less than thirty days for receipt of public comment.

(2) Not more than two members of the Commission shall be of the same political party. At least two members of the Commission shall be enrolled members of any Indian tribe.

(4) A Except as provided in subparagraph (B), the term of office of the members of the Commission shall be three years.

(B) Of the initial members of the Commission—

(i) two members, including the Chairman, shall have a term of office of three years; and

(ii) one member shall have a term of office of one year.

(5) No individual shall be eligible for any appointment to, or to continue service on, the Commission, who—

(A) has been convicted of a felony or gaming offense;
(B) has any financial interest in, or management responsibility for, any gaming activity; or
(C) has a financial interest in, or management responsibility for, any management contract approved pursuant to section 12 of this Act.

President of U.S.

(6) A Commissioner may only be removed from office before the expiration of the term of office of the member by the President (or, in the case of associate member, by the Secretary) for neglect of duty, or malfeasance in office, or for other good cause shown.

(c) Vacancies occurring on the Commission shall be filled in the same manner as the original appointment. A member may serve after the expiration of his term of office until his successor has been appointed, unless the member has been removed for cause under subsection (b)(6).

(d) Two members of the Commission, at least one of which is the Chairman or Vice Chairman, shall constitute a quorum.

(e) The Commission shall select, by majority vote, one of the members of the Commission to serve as Vice Chairman. The Vice Chairman shall serve as Chairman during meetings of the Commission in the absence of the Chairman.

(f) The Commission shall meet at the call of the Chairman or a majority of its members, but shall meet at least once every 4 months.

(g)(1) The Chairman of the Commission shall be paid at a rate equal to that of level IV of the Executive Schedule under section 5316 of title 5, United States Code.
(2) The associate members of the Commission shall each be paid at a rate equal to that of level V of the Executive Schedule under section 5316 of title 5, United States Code.
(3) All members of the Commission shall be reimbursed in accordance with title 5, United States Code, for travel, subsistence, and other necessary expenses incurred by them in the performance of their duties.

POWERS OF THE CHAIRMAN

25 USC 2705. Sec. 6. (a) The Chairman, on behalf of the Commission, shall have power, subject to an appeal to the Commission, to—
(1) issue orders of temporary closure of gaming activities as provided in section 14(b);
(2) levy and collect civil fines as provided in section 14(a);
(3) approve tribal ordinances or resolutions regulating class II gaming and class III gaming as provided in section 11; and
(4) approve management contracts for class II gaming and class III gaming as provided in sections 11(d)(9) and 12.

(b) The Chairman shall have such other powers as may be delegated by the Commission.

POWERS OF THE COMMISSION

25 USC 2706. Sec. 7. (a) The Commission shall have the power, not subject to delegation—
(1) upon the recommendation of the Chairman, to approve the annual budget of the Commission as provided in section 18;
(2) to adopt regulations for the assessment and collection of civil fines as provided in section 14(a);
(3) by an affirmative vote of not less than 2 members, to establish the rate of fees as provided in section 18;
(4) by an affirmative vote of not less than 2 members, to authorize the Chairman to issue subpoenas as provided in section 16; and

(5) by an affirmative vote of not less than 2 members and after a full hearing, to make permanent a temporary order of the Chairman closing a gaming activity as provided in section 14(d)(2).

(b) The Commission—

(1) shall monitor class II gaming conducted on Indian lands on a continuing basis;

(2) shall inspect and examine all premises located on Indian lands on which class II gaming is conducted;

(3) shall conduct or cause to be conducted such background investigations as may be necessary;

(4) may demand access to and inspect, examine, photocopy, and audit all papers, books, and records respecting gross revenues of class II gaming conducted on Indian lands and any other matters necessary to carry out the duties of the Commission under this Act;

(5) may use the United States mail in the same manner and under the same conditions as any department or agency of the United States;

(6) may procure supplies, services, and property by contract in accordance with applicable Federal laws and regulations;

(7) may enter into contracts with Federal, State, tribal and private entities for activities necessary to the discharge of the duties of the Commission and, to the extent feasible, contract the enforcement of the Commission’s regulations with the Indian tribes;

(8) may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission deems appropriate;

(9) may administer oaths or affirmations to witnesses appearing before the Commission; and

(10) shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this Act.

c) The Commission shall submit a report with minority views, if any, to the Congress on December 31, 1989, and every two years thereafter. The report shall include information on—

(1) whether the associate commissioners should continue as full or part-time officials;

(2) funding, including income and expenses, of the Commission;

(3) recommendations for amendments to the Act; and

(4) any other matter considered appropriate by the Commission.

COMMISSION STAFFING

Sec. 8. (a) The Chairman shall appoint a General Counsel to the Commission who shall be paid at the annual rate of basic pay payable for GS-18 of the General Schedule under section 5332 of title 5, United States Code.

(b) The Chairman shall appoint and supervise other staff of the Commission without regard to the provisions of title 5, United States Code, governing appointments in the competitive service. Such staff shall be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification

25 USC 2707.
and General Schedule pay rates, except that no individual so appointed may receive pay in excess of the annual rate of basic pay payable for GS-17 of the General Schedule under section 5332 of that title.

(c) The Chairman may procure temporary and intermittent services under section 3109(b) of title 5, United States Code, but at rates for individuals not to exceed the daily equivalent of the maximum annual rate of basic pay payable for GS-18 of the General Schedule.

(d) Upon the request of the Chairman, the head of any Federal agency is authorized to detail any of the personnel of such agency to the Commission to assist the Commission in carrying out its duties under this Act, unless otherwise prohibited by law.

(e) The Secretary or Administrator of General Services shall provide to the Commission on a reimbursable basis such administrative support services as the Commission may request.

COMMISSION—ACCESS TO INFORMATION

SEC. 9. The Commission may secure from any department or agency of the United States information necessary to enable it to carry out this Act. Upon the request of the Chairman, the head of such department or agency shall furnish such information to the Commission, unless otherwise prohibited by law.

INTERIM AUTHORITY TO REGULATE GAMING

SEC. 10. Notwithstanding any other provision of this Act, the Secretary shall continue to exercise those authorities vested in the Secretary on the day before the date of enactment of this Act relating to supervision of Indian gaming until such time as the Commission is organized and prescribes regulations. The Secretary shall provide staff and support assistance to facilitate an orderly transition to regulation of Indian gaming by the Commission.

TRIBAL GAMING ORDINANCES

SEC. 11. (a)(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this Act.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this Act.

(b)(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe’s jurisdiction, if—

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe’s jurisdiction if such ordinance or resolution provides that—
(A) except as provided in paragraph (d), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;

(B) 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;

(C) annual outside audits of the gaming, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of $25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and

(F) there is an adequate system which—

(i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and

(ii) includes—

(I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses;

(II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and

(III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if—

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

(B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (ii) of paragraph (2)(B);

(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally
incompetent person under a plan approved by the Secretary and
the governing body of the Indian tribe; and

(D) the per capita payments are subject to Federal taxation
and tribes notify members of such tax liability when payments
are made.

(4)(A) A tribal ordinance or resolution may provide for the licensing
or regulation of class II gaming activities owned by any person
or entity other than the Indian tribe and conducted on Indian lands,
only if the tribal licensing requirements include the requirements
described in the subclauses of subparagraph (B)(i) and are at least as
restrictive as those established by State law governing similar
gaming within the jurisdiction of the State within which such
Indian lands are located. No person or entity, other than the Indian
tribe, shall be eligible to receive a tribal license to own a class II
gaming activity conducted on Indian lands within the jurisdiction of
the Indian tribe if such person or entity would not be eligible to
receive a State license to conduct the same activity within the
jurisdiction of the State.

(B)(i) The provisions of subparagraph (A) of this paragraph and
the provisions of subparagraphs (A) and (B) of paragraph (2) shall
not bar the continued operation of an individually owned class II
gaming operation that was operating on September 1, 1986, if—

(I) such gaming operation is licensed and regulated by an
Indian tribe pursuant to an ordinance reviewed and approved
by the Commission in accordance with section 13 of the Act,

(II) income to the Indian tribe from such gaming is used only
for the purposes described in paragraph (2)(D) of this subsection,

(III) not less than 60 percent of the net revenues is income to
the Indian tribe, and

(IV) the owner of such gaming operation pays an appropriate
assessment to the National Indian Gaming Commission under
section 18(a)(I) for regulation of such gaming.

(ii) The exemption from the application of this subsection provided
under this subparagraph may not be transferred to any person or
entity and shall remain in effect only so long as the gaming activity
remains within the same nature and scope as operated on the date
of enactment of this Act.

(iii) Within sixty days of the date of enactment of this Act, the
Secretary shall prepare a list of each individually owned gaming
operation to which clause (i) applies and shall publish such list in
the Federal Register.

(c)(1) The Commission may consult with appropriate law enforcement
officials concerning gaming licenses issued by an Indian tribe
and shall have thirty days to notify the Indian tribe of any objections
to issuance of such license.

(2) If, after the issuance of a gaming license by an Indian tribe,
reliable information is received from the Commission indicating
that a primary management official or key employee does not meet
the standard established under subsection (b)(2)(F)(ii)(II), the Indian
tribe shall suspend such license and, after notice and hearing, may
revoke such license.

(3) Any Indian tribe which operates a class II gaming activity and
which—

(A) has continuously conducted such activity for a period of
not less than three years, including at least one year after the
date of the enactment of this Act; and

(B) has otherwise complied with the provisions of this section
may petition the Commission for a certificate of self-regulation.

(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) investigation, 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.

(5) During any year in which a tribe has a certificate for self-regulation—

(A) the tribe shall not be subject to the provisions of paragraphs (1), (2), (3), and (4) of section 7(b);

(B) the tribe shall continue to submit an annual independent audit as required by section 11(b)(2)(C) and shall submit to the Commission a complete resume on all employees hired and licensed by the tribe subsequent to the issuance of a certificate of self-regulation; and

(C) the Commission may not assess a fee on such activity pursuant to section 18 in excess of one quarter of 1 per centum of the gross revenue.

(6) The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members.

(d)(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—

(A) authorized by an ordinance or resolution that—
   (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,
   (ii) meets the requirements of subsection (b), and
   (iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b).

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that—

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or
(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 12(e)(1)(D).

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D)(i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection—

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3)(A) 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 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.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to—

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 5 of the Act of January 2, 1951 (64 Stat. 1136) shall not apply to any gaming conducted under a Tribal-State compact that—

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7)(A) The United States district courts shall have jurisdiction over—

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that—

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,
the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court—

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures—

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this Act, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates—

(i) any provision of this Act,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by
the Secretary, but only to the extent the compact is consistent with the provisions of this Act.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman’s review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 12.

(e) For purposes of this section, by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this Act.

MANAGEMENT CONTRACTS

SEC. 12. (a)(1) Subject to the approval of the Chairman, an Indian tribe may enter into a management contract for the operation and management of a class II gaming activity that the Indian tribe may engage in under section 11(b)(1), but, before approving such contract, the Chairman shall require and obtain the following information:

(A) the name, address, and other additional pertinent background information on each person or entity (including individuals comprising such entity) having a direct financial interest in, or management responsibility for, such contract, and, in the case of a corporation, those individuals who serve on the board of directors of such corporation and each of its stockholders who hold (directly or indirectly) 10 percent or more of its issued and outstanding stock;

(B) a description of any previous experience that each person listed pursuant to subparagraph (A) has had with other gaming contracts with Indian tribes or with the gaming industry generally, including specifically the name and address of any licensing or regulatory agency with which such person has had a contract relating to gaming; and

(C) a complete financial statement of each person listed pursuant to subparagraph (A).

(2) Any person listed pursuant to paragraph (1)(A) shall be required to respond to such written or oral questions that the Chairman may propound in accordance with his responsibilities under this section.

(3) For purposes of this Act, any reference to the management contract described in paragraph (1) shall be considered to include all collateral agreements to such contract that relate to the gaming activity.

(b) The Chairman may approve any management contract entered into pursuant to this section only if he determines that it provides at least—

(1) for adequate accounting procedures that are maintained, and for verifiable financial reports that are prepared, by or for the tribal governing body on a monthly basis;
(2) for access to the daily operations of the gaming to appropriate tribal officials who shall also have a right to verify the daily gross revenues and income made from any such tribal gaming activity;

(3) for a minimum guaranteed payment to the Indian tribe that has preference over the retirement of development and construction costs;

(4) for an agreed ceiling for the repayment of development and construction costs;

(5) for a contract term not to exceed five years, except that, upon the request of an Indian tribe, the Chairman may authorize a contract term that exceeds five years but does not exceed seven years if the Chairman is satisfied that the capital investment required, and the income projections, for the particular gaming activity require the additional time; and

(c) The Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity if the Chairman determines that such percentage fee is reasonable in light of surrounding circumstances. Except as otherwise provided in this subsection, such fee shall not exceed 30 percent of the net revenues.

(2) Upon the request of an Indian tribe, the Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity that exceeds 30 percent but not 40 percent of the net revenues if the Chairman is satisfied that the capital investment required, and income projections, for such tribal gaming activity require the additional fee requested by the Indian tribe.

(d) By no later than the date that is 180 days after the date on which a management contract is submitted to the Chairman for approval, the Chairman shall approve or disapprove such contract on its merits. The Chairman may extend the 180-day period by not more than 90 days if the Chairman notifies the Indian tribe in writing of the reason for the extension. The Indian tribe may bring an action in a United States district court to compel action by the Chairman if a contract has not been approved or disapproved within the period required by this subsection.

(e) The Chairman shall not approve any contract if the Chairman determines that—

(1) any person listed pursuant to subsection (a)(1)(A) of this section—

(A) is an elected member of the governing body of the Indian tribe which is the party to the management contract;

(B) has been or subsequently is convicted of any felony or gaming offense;

(C) has knowingly and willfully provided materially important false statements or information to the Commission or the Indian tribe pursuant to this Act or has refused to respond to questions propounded pursuant to subsection (a)(2); or

(D) has been determined to be a person whose prior activities, criminal record if any, or reputation, habits, and associations pose a threat to the public interest or to the
effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto;

(2) the management contractor has, or has attempted to, unduly interfere or influence for its gain or advantage any decision or process of tribal government relating to the gaming activity;

(3) the management contractor has deliberately or substantially failed to comply with the terms of the management contract or the tribal gaming ordinance or resolution adopted and approved pursuant to this Act; or

(4) a trustee, exercising the skill and diligence that a trustee is commonly held to, would not approve the contract.

(f) The Chairman, after notice and hearing, shall have the authority to require appropriate contract modifications or may void any contract if he subsequently determines that any of the provisions of this section have been violated.

(g) No management contract for the operation and management of a gaming activity regulated by this Act shall transfer or, in any other manner, convey any interest in land or other real property, unless specific statutory authority exists and unless clearly specified in writing in said contract.

(h) The authority of the Secretary under section 2163 of the Revised Statutes (25 U.S.C. 81), relating to management contracts regulated pursuant to this Act, is hereby transferred to the Commission.

(i) The Commission shall require a potential contractor to pay a fee to cover the cost of the investigation necessary to reach a determination required in subsection (e) of this section.

REVIEW OF EXISTING ORDINANCES AND CONTRACTS

Sec. 13. (a) As soon as practicable after the organization of the Commission, the Chairman shall notify each Indian tribe or management contractor who, prior to the enactment of this Act, adopted an ordinance or resolution authorizing class II gaming or class III gaming or entered into a management contract, that such ordinance, resolution, or contract, including all collateral agreements relating to the gaming activity, must be submitted for his review within 60 days of such notification. Any activity conducted under such ordinance, resolution, contract, or agreement shall be valid under this Act, or any amendment made by this Act, unless disapproved under this section.

(b)(1) By no later than the date that is 90 days after the date on which an ordinance or resolution authorizing class II gaming or class III gaming is submitted to the Chairman pursuant to subsection (a), the Chairman shall review such ordinance or resolution to determine if it conforms to the requirements of section 11(b) of this Act.

(2) If the Chairman determines that an ordinance or resolution submitted under subsection (a) conforms to the requirements of section 11(b), the Chairman shall approve it.

(3) If the Chairman determines that an ordinance or resolution submitted under subsection (a) does not conform to the requirements of section 11(b), the Chairman shall provide written notification of...
necessity modifications to the Indian tribe which shall have not more than 120 days to bring such ordinance or resolution into compliance.

(c)(1) Within 180 days after the submission of a management contract, including all collateral agreements, pursuant to subsection (a), the Chairman shall subject such contract to the requirements and process of section 12.

(2) If the Chairman determines that a management contract submitted under subsection (a), and the management contractor under such contract, meet the requirements of section 12, the Chairman shall approve the management contract.

(3) If the Chairman determines that a contract submitted under subsection (a), or the management contractor under a contract submitted under subsection (a), does not meet the requirements of section 12, the Chairman shall provide written notification to the parties to such contract of necessary modifications and the parties shall have not more than 120 days to come into compliance. If a management contract has been approved by the Secretary prior to the date of enactment of this Act, the parties shall have not more than 180 days after notification of necessary modifications to come into compliance.

CIVIL PENALTIES

25 USC 2713.

Sec. 14. (a)(1) Subject to such regulations as may be prescribed by the Commission, the Chairman shall have authority to levy and collect appropriate civil fines, not to exceed $25,000 per violation, against the tribal operator of an Indian game or a management contractor engaged in gaming for any violation of any provision of this Act, any regulation prescribed by the Commission pursuant to this Act, or tribal regulations, ordinances, or resolutions approved under section 11 or 13.

(2) The Commission shall, by regulation, provide an opportunity for an appeal and hearing before the Commission on fines levied and collected by the Chairman.

(3) Whenever the Commission has reason to believe that the tribal operator of an Indian game or a management contractor is engaged in activities regulated by this Act, by regulations prescribed under this Act, or by tribal regulations, ordinances, or resolutions, approved under section 11 or 13, that may result in the imposition of a fine under subsection (a)(1), the permanent closure of such game, or the modification or termination of any management contract, the Commission shall provide such tribal operator or management contractor with a written complaint stating the acts or omissions which form the basis for such belief and the action or choice of action being considered by the Commission. The allegation shall be set forth in common and concise language and must specify the statutory or regulatory provisions alleged to have been violated, but may not consist merely of allegations stated in statutory or regulatory language.

(b)(1) The Chairman shall have power to order temporary closure of an Indian game for substantial violation of the provisions of this Act, of regulations prescribed by the Commission pursuant to this Act, or of tribal regulations, ordinances, or resolutions approved under section 11 or 13 of this Act.

(2) Not later than thirty days after the issuance by the Chairman of an order of temporary closure, the Indian tribe or management contractor involved shall have a right to a hearing before the
Commission to determine whether such order should be made permanent or dissolved. Not later than sixty days following such hearing, the Commission shall, by a vote of not less than two of its members, decide whether to order a permanent closure of the gaming operation.

(c) A decision of the Commission to give final approval of a fine levied by the Chairman or to order a permanent closure pursuant to this section shall be appealable to the appropriate Federal district court pursuant to chapter 7 of title 5, United States Code.

(d) Nothing in this Act precludes an Indian tribe from exercising regulatory authority provided under tribal law over a gaming establishment within the Indian tribe's jurisdiction if such regulation is not inconsistent with this Act or with any rules or regulations adopted by the Commission.

**JUDICIAL REVIEW**

Sec. 15. Decisions made by the Commission pursuant to sections 11, 12, 13, and 14 shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of title 5, United States Code.

**SUBPOENA AND DEPOSITION AUTHORITY**

Sec. 16. (a) By a vote of not less than two members, the Commission shall have the power to require by subpoena the attendance and testimony of witnesses and the production of all books, papers, and documents relating to any matter under consideration or investigation. Witnesses so summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(b) The attendance of witnesses and the production of books, papers, and documents, may be required from any place in the United States at any designated place of hearing. The Commission may request the Secretary to request the Attorney General to bring an action to enforce any subpoena under this section.

(c) Any court of the United States within the jurisdiction of which an inquiry is carried on may, in case of contumacy or refusal to obey a subpoena for any reason, issue an order requiring such person to appear before the Commission (and produce books, papers, or documents as so ordered) and give evidence concerning the matter in question and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(d) A Commissioner may order testimony to be taken by deposition in any proceeding or investigation pending before the Commission at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the Commission and having power to administer oaths. Reasonable notice must first be given to the Commission in writing by the party or his attorney proposing to take such deposition, and, in cases in which a Commissioner proposes to take a deposition, reasonable notice must be given. The notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce books, papers, or documents, in the same manner as witnesses may be compelled to appear and testify and produce like documentary evidence before the Commission, as hereinbefore provided.
(e) Every person deposing as herein provided shall be cautioned and shall be required to swear (or affirm, if he so requests) to testify to the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent. All depositions shall be promptly filed with the Commission.

(f) Witnesses whose depositions are taken as authorized in this section, and the persons taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

INVESTIGATIVE POWERS

Sec. 17. (a) Except as provided in subsection (b), the Commission shall preserve any and all information received pursuant to this Act as confidential pursuant to the provisions of paragraphs (4) and (7) of section 552(b) of title 5, United States Code.

(b) The Commission shall, when such information indicates a violation of Federal, State, or tribal statutes, ordinances, or resolutions, provide such information to the appropriate law enforcement officials.

(c) The Attorney General shall investigate activities associated with gaming authorized by this Act which may be a violation of Federal law.

COMMISSION FUNDING

Sec. 18. (a)(1) The Commission shall establish a schedule of fees to be paid to the Commission annually by each class II gaming activity that is regulated by this Act.

(2)(A) The rate of the fees imposed under the schedule established under paragraph (1) shall be—

(i) no less than 0.5 percent nor more than 2.5 percent of the first $1,500,000, and

(ii) no more than 5 percent of amounts in excess of the first $1,500,000,

of the gross revenues from each activity regulated by this Act.

(B) The total amount of all fees imposed during any fiscal year under the schedule established under paragraph (1) shall not exceed $1,500,000.

(3) The Commission, by a vote of not less than two of its members, shall annually adopt the rate of the fees authorized by this section which shall be payable to the Commission on a quarterly basis.

(4) Failure to pay the fees imposed under the schedule established under paragraph (1) shall, subject to the regulations of the Commission, be grounds for revocation of the approval of the Chairman of any license, ordinance, or resolution required under this Act for the operation of gaming.

(5) To the extent that revenue derived from fees imposed under the schedule established under paragraph (1) are not expended or committed at the close of any fiscal year, such surplus funds shall be credited to each gaming activity on a pro rata basis against such fees imposed for the succeeding year.

(6) For purposes of this section, gross revenues shall constitute the annual total amount of money wagered, less any amounts paid out as prizes or paid for prizes awarded and less allowance for amortization of capital expenditures for structures.
(b)(1) The Commission, in coordination with the Secretary and in conjunction with the fiscal year of the United States, shall adopt an annual budget for the expenses and operation of the Commission.

(2) The budget of the Commission may include a request for appropriations, as authorized by section 19, in an amount equal the amount of funds derived from assessments authorized by subsection (a) for the fiscal year preceding the fiscal year for which the appropriation request is made.

(3) The request for appropriations pursuant to paragraph (2) shall be subject to the approval of the Secretary and shall be included as a part of the budget request of the Department of the Interior.

**AUTHORIZATION OF APPROPRIATIONS**

Sec. 19. (a) Subject to the provisions of section 18, there are hereby authorized to be appropriated such sums as may be necessary for the operation of the Commission.

(b) Notwithstanding the provisions of section 18, there are hereby authorized to be appropriated not to exceed $2,000,000 to fund the operation of the Commission for each of the fiscal years beginning October 1, 1988, and October 1, 1989.

**GAMING ON LANDS ACQUIRED AFTER ENACTMENT OF THIS ACT**

Sec. 20. (a) Except as provided in subsection (b), gaming regulated by this Act shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after the date of enactment of this Act unless—

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on the date of enactment of this Act; or

(2) the Indian tribe has no reservation on the date of enactment of this Act and—

(A) such lands are located in Oklahoma and—

(i) are within the boundaries of the Indian tribe’s former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe’s last recognized reservation within the State or States within which such Indian tribe is presently located.

(b)(1) Subsection (a) will not apply when—

(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary’s determination; or

(B) lands are taken into trust as part of—

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or
(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

(2) Subsection (a) shall not apply to

(A) any lands involved in the trust petition of the St. Croix Chippewa Indians of Wisconsin that is the subject of the action filed in the United States District Court for the District of Columbia entitled St. Croix Chippewa Indians of Wisconsin v. United States, Civ. No. 86–2278, or

(B) the interests of the Miccosukee Tribe of Indians of Florida in approximately 25 contiguous acres of land, more or less, in Dade County, Florida, located within one mile of the intersection of State Road Numbered 27 (also known as Krome Avenue) and the Tamiami Trail.

(3) Upon request of the governing body of the Miccosukee Tribe of Indians of Florida, the Secretary shall, notwithstanding any other provision of law, accept the transfer by such Tribe to the Secretary of the interests of such Tribe in the lands described in paragraph (2)(B) and the Secretary shall declare that such interests are held in trust by the Secretary for the benefit of such Tribe and that such interests are part of the reservation of such Tribe under sections 5 and 7 of the Act of June 18, 1934 (48 Stat. 985; 25 U.S.C. 465, 467), subject to any encumbrances and rights that are held at the time of such transfer by any person or entity other than such Tribe. The Secretary shall publish in the Federal Register the legal description of any lands that are declared held in trust by the Secretary under this paragraph.

(c) Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.

(d)(1) The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this Act, or under a Tribal-State compact entered into under section 11(d)(3) that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

(2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after the date of enactment of this Act unless such other provision of law specifically cites this subsection.

**DISSEMINATION OF INFORMATION**

Sect. 21. Consistent with the requirements of this Act, sections 1301, 1302, 1303 and 1304 of title 18, United States Code, shall not apply to any gaming conducted by an Indian tribe pursuant to this Act.

**SEVERABILITY**

Sect. 22. In the event that any section or provision of this Act, or amendment made by this Act, is held invalid, it is the intent of Congress that the remaining sections or provisions of this Act, and amendments made by this Act, shall continue in full force and effect.
PUBLIC LAW 100-497—OCT. 17, 1988

CRIMINAL PENALTIES

Sec. 23. Chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following new sections:

"§ 1166. Gambling in Indian country

"(a) Subject to subsection (c), for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.

"(b) Whoever in Indian country is guilty of any act or omission involving gambling, whether or not conducted or sanctioned by an Indian tribe, which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred, under the laws governing the licensing, regulation, or prohibition of gambling in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

"(c) For the purpose of this section, the term ‘gambling’ does not include—

"(1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or

"(2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act that is in effect.

"(d) The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act, or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

"§ 1167. Theft from gaming establishments on Indian lands

"(a) Whoever abstracts, purloins, willfully misapplies, or takes and carries away with intent to steal, any money, funds, or other property of a value of $1,000 or less belonging to an establishment operated by or for or licensed by an Indian tribe pursuant to an ordinance or resolution approved by the National Indian Gaming Commission shall be fined not more than $100,000 or be imprisoned for not more than one year, or both.

"(b) Whoever abstracts, purloins, willfully misapplies, or takes and carries away with intent to steal, any money, funds, or other property of a value in excess of $1,000 belonging to a gaming establishment operated by or for or licensed by an Indian tribe pursuant to an ordinance or resolution approved by the National Indian Gaming Commission shall be fined not more than $250,000, or imprisoned for not more than ten years, or both.

"§ 1168. Theft by officers or employees of gaming establishments on Indian lands

"(a) Whoever, being an officer, employee, or individual licensee of a gaming establishment operated by or for or licensed by an Indian tribe pursuant to an ordinance or resolution approved by the National Indian Gaming Commission, embezzles, abstracts, purloins,
willfully misapplies, or takes and carries away with intent to steal, any moneys, funds, assets, or other property of such establishment of a value of $1,000 or less shall be fined not more than $250,000 and be imprisoned for not more than five years, or both;  
“(b) Whoever, being an officer, employee, or individual licensee of a gaming establishment operated by or for or licensed by an Indian tribe pursuant to an ordinance or resolution approved by the National Indian Gaming Commission, embezzles, abstracts, purloins, willfully misapplies, or takes and carries away with intent to steal, any moneys, funds, assets, or other property of such establishment of a value in excess of $1,000 shall be fined not more than $1,000,000 or imprisoned for not more than twenty years, or both.”

CONFORMING AMENDMENT

Sec. 24. The table of contents for chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following:

“1166. Gambling in Indian country.
“1167. Theft from gaming establishments on Indian lands.
“1168. Theft by officers or employees of gaming establishments on Indian lands.”


LEGISLATIVE HISTORY—S. 555:

SENATE REPORTS: No. 190-446 (Select Comm. on Indian Affairs).
Sept. 15, considered and passed Senate.
Sept. 26, 27, considered and passed House.
This appeal involves a question arising under Public Law 280, the federal law permitting states to exercise civil and criminal jurisdiction over the Indian tribes. All parties agree that the case turns on the determination of whether Florida Statute Section 849.093 which permits bingo games to be played by certain qualified organizations subject to restrictions by the state is civil/regulatory or criminal/prohibitory in nature. If the statute is civil/regulatory within the meaning of Bryan v. Itasca County, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976), the statute cannot be enforced against the Seminole Tribe of Florida.

This lawsuit commenced when the Seminole Indian tribe brought an action under 28 U.S.C. §§ 2201 and 2202, seeking a declaratory judgment and injunctive relief against Robert Butterworth, the sheriff of Broward County, Florida. The Seminole tribe had contracted with a private limited partnership that agreed to build and operate a bingo hall on the Indian reservation in exchange for a percentage of the profits as management fees. Anticipating violation of the Florida bingo statute, Sheriff Butterworth informed the tribe that he would make arrests for any violations of Fla.Stat. § 849.093. The attorney general of the state of Florida filed a petition on behalf of the state seeking leave to participate in the case as amicus curiae, and leave was granted.
stipulated facts, the parties filed cross motions for summary judgment, presenting the question to
the district court, 491 F.Supp. 1015, whether the statute could be enforced against the Indian
nation. After finding that the case satisfied the "case or controversy" requirement of the
Constitution, the district judge granted the plaintiff's motion for summary judgment on the
ground that the statute in question was regulatory in nature and therefore could not be enforced
against the Indian tribe. The lower court enjoined the sheriff from enforcing the statute against
the plaintiff. The sheriff of Broward County and the State of Florida appealed the lower court's
decision to this court, but agreeing with the lower court, we affirm its decision.

I. Can Indians Operate Bingo Halls?

The states lack jurisdiction over Indian reservation activity until granted that authority by the
federal government; however, Sections 2 and 4 of Public Law 280 granted certain states the
right to exercise criminal jurisdiction and limited civil jurisdiction over the Indian tribes. Section
7 of the Act granted to other states the right to assume criminal and civil jurisdiction by
legislative enactment, and although this section was repealed in 1968 by Section 403(b) of Public
Law 90-284, any cessions of jurisdiction made pursuant to the Act prior to its repeal were not
affected. Pursuant to the former Public Law 280 the state of Florida assumed criminal
jurisdiction over reservation Indians in Fla.Stat. § 285.16. By this enactment, Florida assumed
jurisdiction over the Indians to the full extent allowed by the law.

In Bryan v. Itasca County, supra, 426 U.S. at 383, 96 S.Ct. at 210, the Supreme Court of the
United States interpreted Public Law 280 as granting civil jurisdiction to the states only to the
extent necessary to resolve private disputes between Indians and Indians and private citizens. In
Bryan the petitioner Indian sought relief from a personal property tax that the state had levied
against his mobile home. The Court interpreted the language of Section 4(a) of Public Law 280
providing for civil jurisdiction as follows:

(Subsection (a) seems to have been primarily intended to redress the lack of Indian forums for
resolving private legal disputes between reservation Indians, and between Indians and other
private citizens, by permitting the courts of the States to decide such disputes .... (The statute)
authorizes application by the state courts of their rules of decision to decide such disputes. Id. at
383-84, 96 S.Ct. at 2108.

After further discussion the Court concluded 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." Id. at 390, 96 S.Ct. at 2111. 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 280. Thus, the mandate
from the Supreme Court is that states do not have general regulatory power over the Indian
tribes.

The difficult question remaining in a case such as the present one is whether the statute in
question represents an exercise of the state's regulatory or prohibitory authority. The parties have
presented the question for decision to this court in that form, and several cases out of the Ninth
Circuit have addressed similar Indian problems with the same or a similar analysis. See United States v. Farris, 624 F.2d 890 (9th Cir. 1980); United States v. County of Humboldt, 615 F.2d 1280 (9th Cir. 1980); United States v. Marcyes, 557 F.2d 1361 (9th Cir. 1977). See also Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975). Thus, under a civil/regulatory versus criminal/prohibitory analysis, we consider the Florida statute in question to determine whether the operation of bingo games is prohibited as against the public policy of the state or merely regulated by the state.

Fla.Stat. Section 849.093 provides that the general prohibition against lotteries does not apply to "nonprofit or veterans' organizations engaged in charitable, civic, community, benevolent, religious or scholastic works or other similar activities ... from conducting bingo games or guest games, provided that the entire proceeds derived from the conduct of such games shall be donated by such organizations to the endeavors mentioned above." Id. Section 2 of the statute sets out conditions of operation for organizations not engaged in the charitable activities listed above. The remaining sections of the statute state restrictions for the operation of bingo games and penal sanctions for violation of those provisions. Although the inclusion of penal sanctions makes it tempting at first glance to classify the statute as prohibitory, the statute cannot be automatically classified as such. A simplistic rule depending on whether the statute includes penal sanctions could result in the conversion of every regulatory statute into a prohibitory one. See United States v. Marcyes, supra, 557 F.2d at 1364. The classification of the statute is more complex, and requires a consideration of the public policy of the state on the issue of bingo and the intent of the legislature in enacting the bingo statute.

The Florida Constitution provides: "lotteries, other than he types of pari-mutuel pools authorized by law ..., are hereby prohibited in this state." Art. X, § 7, Fla.Const. The legislature has the power to prohibit or regulate all other forms of gambling, and in Greater Loretta Improvement Ass'n v. State ex rel. Boone, 234 So.2d 665 (Fla.1970), the Florida Supreme Court recognized that bingo was one of the forms of gambling, along with horse racing, dog racing, and jai alai, excepted from the lottery prohibition and permitted to be regulated by the state. Based on the definition of "pari-mutuel" and the fact that the bingo statute was enacted the same year that the Constitution was revised, the court held that the bingo statute did not violate the Constitution of Florida. In a later constitutional challenge, Carroll v. State, 361 So.2d 144 (Fla.1978), the Supreme Court of Florida stated that while the legislature cannot legalize any gambling device that would in effect amount to a lottery, it has an inherit power to regulate or to prohibit any and all other forms of gambling. In exercising this power to regulate, the legislature, in its wisdom, has seen fit to permit bingo as a form of recreation, and at the same time, has allowed worthy organizations to receive the benefits. (citations omitted) (emphasis added) Id. at 146-47.

Although this language suggesting that the legislature has chosen to regulate bingo is not binding on this court as to whether the statute is regulatory or prohibitory, the language indicates that the game of bingo is not against the public policy of the state of Florida. See also State v. Appelbaum, 366 So.2d 443 (Fla.1979) ("The statute... regulates the conduct of bingo...."). Bingo appears to fall in a category of gambling that the state has chosen to regulate by imposing certain limitations to avoid abuses. Where the state regulates the operation of bingo halls to prevent the game of bingo from becoming a money-making business, the Seminole Indian tribe is not subject to that regulation and cannot be prosecuted for violating the limitations imposed.
In holding that the bingo statute in question is regulatory, we must address two Ninth Circuit cases in which similar issues were raised. In United States v. Marcyes, supra, 557 F.2d at 1364, the Ninth Circuit held that a fireworks statute of the state of Washington was a prohibitory statute of the state, and therefore was necessarily included within the ambit of the Assimilative Crimes Act, 18 U.S.C. § 13. The fireworks statute, like the bingo statute in question, permitted the activity to take place under certain circumstances. Despite these exceptions, to the statute, however, the Ninth Circuit found that the statute's "intent was to prohibit the general possession and/or sale of dangerous fireworks" and that it was "not primarily a licensing law." Id. The lower court in the present case relied on Marcyes for its discussion of the regulatory/prohibitory distinction, but distinguished the case based on the fact that fireworks are dangerous items that, if bought on an Indian reservation, can be carried off of it. The operation of bingo halls, on the other hand, must necessarily remain on the reservation. Although the distinction is a legitimate one, the determination underlying it is a legislative decision which we are not at liberty to make. Instead we find that the real distinction between the cases lies in the reference to each state's law as to whether the statutes in question were prohibitory or regulatory. Legislative intent determines whether the statute is regulatory or prohibitory, and although the state of Florida prohibits lotteries in general, exceptions are made for certain forms of gambling including bingo. All parties agree 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.

In a more recent and in some respects more similar case, United States v. Farris, supra, 624 F.2d 890, the Ninth Circuit found that members of the Puyallup Indian tribe could not be prohibited from operating a gambling casino on the reservation because the state of Washington had not assumed jurisdiction over gambling offenses. However, in considering whether the provisions of 18 U.S.C. § 1955 of the Organized Crime Control Act of 1970 could apply to non-Indians gambling on the reservation, the Ninth Circuit analyzed the public policy of the state of Washington and determined that the state prohibited professional gambling. The court found that the "violation of a law of a state" requirement of section 1955 was intended to exempt from federal prosecution the operators of gambling businesses in states where gambling was not contrary to the public policy of the state, and the legislative declaration in Washington's gambling statute indicated a clear legislative intent to prohibit professional gambling. Specifically noting the exception of Florida fronton operators to the gambling provisions, the court reiterated that the federal statute could apply only in states where gambling was illegal. Washington, unlike Florida, was such a state, and thus the statute could be enforced against non-Indians gambling on the reservation. Cf. Rincon Band of Mission Indians v. County of San Diego, 324 F.Supp. 371 (S.D.Calif.1971), rev'd on other grounds, 495 F.2d 1 (9th Cir. 1974) (court held local ordinance prohibiting gambling was within ambit of phrase "laws of such state" of Public Law 280 so that gambling provisions could apply to Indians on the reservation).

Although the Ninth Circuit found that the casino operation of the Puyallup Indians was a "violation of the law of a state" for which non-Indians could be prosecuted under the federal
gambling law, the case supports the proposition that the state's public policy determines whether the activity is prohibited or regulated. Although the Florida Constitution, the Florida Supreme Court, and the Florida legislature have in various forms denounced the "evils of gambling," it is clear from the provisions of the bingo statute in question and the statutory scheme of the Florida gambling provisions considered as a whole that the playing of bingo and operation of bingo halls is not contrary to the public policy of the state. Other courts prohibiting other forms of gambling have found those forms of gambling contrary to the public policy of the state. As the district court noted, this case presents a close and difficult question. The Supreme Court in interpreting Public Law 280 has stated that "statutes passed for the benefit of dependent Indian tribes ... are to be liberally construed, doubtful expressions being resolved in favor of the Indians.” Bryan v. Itasca County, supra, 426 U.S. at 392, 96 S.Ct. at 2112. Although the regulatory bingo statute may arguably be interpreted as prohibitory, the resolution must be in favor of the Indian tribe.

II. Can Non-Indians Play?

Although we have concluded that the Florida bingo statute cannot be enforced against the Seminole tribe, Sheriff Butterworth and the State of Florida petition this court for a ruling requiring the Seminole Indians to distinguish between Indians and non-Indians and abide by the restrictions of the statute as to non-Indians. It is not altogether clear how petitioner proposes that such distinctions practically could be made without prohibiting non-Indians from play or imposing the restrictions on all players, Indian and non-Indian alike. Furthermore, the relief sought continues to request the right to enforce regulation of the Indians operation of bingo games. We reject petitioner's argument for these and the following reasons.

First, as respondent strongly points out, the argument was never presented below. The issue presented to the district judge on stipulated facts involved only the question of whether the statute could be enforced to prevent the Indians from violating its restrictions. As a general rule the court of appeals need not address issues raised for the first time by a party on appeal. See Adams v. Askew, 511 F.2d 700 (5th Cir. 1975); D.H. Overmyer Co. v. Lofling, 440 F.2d 1213 (5th Cir. 1971). Furthermore, we note that the statute in question, Fla.Stat. § 849.093, makes no reference to violations of its restrictions by the players of bingo. Sheriff Butterworth suggests that several general lottery prohibition statutes, such as Fla.Stat. §§ 849.08, 849.09(1)(b), and 849.09(2), permit the arrest of bingo players as players of illegal lotteries; however, we refuse to recognize in one breath that bingo is excluded from the general lottery prohibition and in the next permit the arrest of bingo players as players of illegal lotteries. The statutes cited must be considered in pari materia with the bingo statute permitting the operation of bingo games. The bingo statute does not prohibit the playing of bingo games in violation of its restrictions, and if the legislature of the state of Florida desires to prohibit such, then it must act accordingly. The courts that have prohibited Indians or non-Indians from gambling on reservations have done so in light of a statute that specifically prohibits the act of gambling. In Florida, unlike in Washington, no distinction exists between Indians and non-Indians for the legality (or illegality) of certain gambling activities. Thus, petitioner's attempts to require the Seminoles to distinguish between Indian and non-Indian players are to no avail. The decision of the lower court is AFFIRMED.
RONEY, Circuit Judge, dissenting:

I respectfully dissent on the ground that the State of Florida has prohibited, not regulated, the precise kind of bingo operation which the plaintiff seeks to conduct. As a matter of fact, it is because such activity is prohibited in Florida that this business was started and is successful. The reasons that Florida laws prohibit such a bingo business, focusing on the indirect consequences of it, whether right or wrong, are as applicable to a bingo casino on the Indian reservation as they are to such a business off a reservation. If only Indians were involved, or if the effects of the bingo casino were shown to be confined to the reservation, the decisions relied upon by the Court might be applicable. Without such a showing, in my opinion, they are not. I would reverse.

*Former Fifth Circuit case, Section 9(1) of Public Law 96-452 October 14, 1980

1 The Florida bingo statute provides as follows:

849093 Charitable, nonprofit organizations; certain endeavors permitted

(1) As used in this section:

(a) "Bingo game" means and refers to the activity commonly known as "bingo" wherein participants pay a sum of money for the use of one or more cards. When the game commences, numbers are drawn by chance, one by one, and announced. The players cover or mark those numbers on the cards which they have purchased until a player receives a given order of numbers in sequence that has been preannounced for that particular game. This player calls out "bingo" and is declared the winner of a predetermined prize. More than one game may be played upon a bingo card, and numbers called for one game may be used for a succeeding game or games.

(b) "Bingo card" means and refers to the flat piece of paper or thin pasteboard employed by players engaged in the game of bingo. More than one set of bingo numbers may be printed on any single piece of paper.

(2) None of the provisions of this chapter shall be construed to prohibit or prevent nonprofit or veterans’ organizations engaged in charitable, civic, community, benevolent, religious, or scholastic works or other similar activities, which organizations have been in existence for a period of 3 years or more, from conducting bingo games or guest games, provided that the entire proceeds derived from the conduct of such games, less actual business expenses for articles designed for and essential to the operation, conduct, and playing of bingo, shall be donated by such organizations to the endeavors mentioned above. In no case shall the net proceeds from the conduct of such games be used for any other purpose whatsoever. The proceeds derived from the conduct of bingo games shall not be considered solicitation of public donations.

(3) If an organization is not engaged in efforts of the type set out above, its right to conduct bingo or guest games hereunder shall be conditioned upon the return of all the proceeds from such games to the players in the form of prizes. If at the conclusion of play on any day during which a bingo or guest game 1 is allowed to be played under this section there remain proceeds
which have not been paid out as prizes, the nonprofit organization conducting the game shall at
the next scheduled day of play conduct bingo or guest games without any charge to the players
and shall continue to do so until the proceeds carried over from the previous days played have
been exhausted. This provision in no way extends the limitation on the number of prize or
jackpot games allowed in one night as provided for in subsection (5).

(4) The number of days during which such organizations as are authorized hereunder may
conduct bingo or guest games per week shall not exceed two.

(5) No jackpot shall exceed the value of $100 in actual money or its equivalent, and there shall
be no more than one jackpot in any one night.

(6) There shall be only one prize or jackpot on any one day of play of $100. All other game
prizes shall not exceed $25.

(7) Each person involved in the conduct of any bingo or guest game must be a resident of the
community where the organization is located and a bona fide member of the organization
sponsoring such game and shall not be compensated in any way for operation of said bingo or
guest game.

(8) No one under 18 years of age shall be allowed to play.

(9) Bingo or guest games shall be held only on the following premises:

(a) Property owned by the nonprofit organization;

(b) Property owned by the charity or organization that will benefit by the proceeds;

(c) Property leased full time for a period of not less than 1 year by the nonprofit organization or
by the charity or organization that will benefit by the proceeds;

(d) Property owned by and leased from another nonprofit organization qualified under this
section; or

(e) Property owned by a municipality or a county when the governing authority has, by
appropriate ordinance or resolution, specifically authorized the use of such property for the
conduct of such games.

(10) Any organization or other person who willfully and knowingly violates any provision in this
section is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s.
775.083. For a second or subsequent offense, the organization or other person is guilty of a
felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

The two sections were codified at 18 U.S.C.A. § 1162 and 28 U.S.C.A. § 1360, respectively. The
first section concerned state assumption of criminal jurisdiction and the second involved
assumption of civil jurisdiction. These sections were directed at the willing states of California,
Minnesota, Nebraska, Oregon and Wisconsin (later adding Alaska), which are sometimes referred to as the mandatory states because the assumption of jurisdiction was dictated by the statute

3 67 Stat. 590 (1953) (repealed by Pub.L. 90-284, Title IV, § 403, 82 Stat. 79 (1968). The former section provided:

The consent of the United States is hereby given to any other state not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this act, to assume jurisdiction at such time and in such manner as the people of the state shall by affirmative legislative action obligate and bind the state to assumption thereof.

The repeal changed the law to require the consent of the Indians to any further assumption of jurisdiction.

4 See note 2 supra. Section 4(a) provides:

(a) Each of the States or Territories listed ... shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country ... to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory ....

5 For the text of the statute, see note 1 supra

6 The statute as originally enacted contained no penal sanctions for its violation. The penalties were added by amendment in 1973, Laws 1973, c. 73-229, § 1. Arguably, the original enactment of the statute without penal sanctions indicates a legislative intent that the statute be construed as regulatory

7 Arguably, the Florida bingo statute could be viewed as a narrow exception to the general prohibition against lotteries, permitting bingo operations only when the activity was recreational or charitable, and not for profit. Under this view urged by petitioner, professional, money-making bingo operations continue to be prohibited. Even if we were to accept this view of the statute as prohibiting professional bingo, the Seminole Indian tribe could arguably qualify as a nonprofit organization "engaged in charitable, civic, community, benevolent, religious or scholastic works or other similar activities" as prescribed in the statute. The Seminole's complaint alleges that the profits received by the tribe from the bingo activities are to be invested for the betterment of the Indian community. Although the Indian nation may not qualify as a charitable organization within the letter of the statute, the Seminole tribe could be said to fall within the spirit of its permissive intent

8 The Wash.Rev.Code § 9.46.010 provides:
It is hereby declared to be the policy of the legislature, recognizing the close relationship between professional gambling and organized crime, to restrain all persons from seeking profit from professional gambling activities in this state; (and) to restrain all persons from patronizing such professional gambling activities.

The petitioner has cited a line of cases culminating in Washington v. Confederated Tribes, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), for the proposition that states can require Indians to apply state regulations to non-Indians who engage in activity on Indian reservations. Washington v. Confederated Tribes, supra, involved the imposition of a state sales tax on the purchase of cigarettes. The Court required an Indian smoke shop owner to precollect the tax imposed on the buyer. Although we recognize the validity of the line of cases cited, we note that an important distinction exists between the present case and those cases where regulations are imposed on non-Indians. In the present case the only regulation involved is directed at the Indian operators of the bingo hall, not its non-Indian bingo player. Thus, even if we were to fully address petitioner's argument, the line of cases cited would not require a contrary holding.

448 U.S. 136

White Mountain Apache Tribe v. Bracker (No. 78-1177)

Argued: January 14, 1980
Decided: June 27, 1980

Syllabus

Pursuant to a contract with an organization of petitioner White Mountain Apache Tribe, petitioner Pinetop Logging Co. (Pinetop), a non-Indian enterprise authorized to do business in Arizona, felled tribal timber on the Fort Apache Reservation and transported it to the tribal organization's sawmill. Pinetop's activities were performed solely on the reservation. Respondents, state agencies and members thereof, sought to impose on Pinetop Arizona's motor carrier license tax, which is assessed on the basis of the carrier's gross receipts, and its use fuel tax, which is assessed on the basis of diesel fuel used to propel a motor vehicle on any highway within the State. Pinetop paid the taxes under protest and then brought suit in state court, asserting that, under federal law, the taxes could not lawfully be imposed on logging activities conducted exclusively within the reservation or on hauling activities on Bureau of Indian Affairs (BIA) and tribal roads. The trial court awarded summary judgment to respondents, and the Arizona Court of Appeals affirmed in pertinent part, rejecting petitioners' preemption claim.


(a) The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been preempted by operation of federal law. Where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation, a particularized inquiry must be made into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law. Pp. 141-145.
(b) The Federal Government's regulation of the harvesting, sale, and management of tribal timber, and of the BIA and tribal roads, is so pervasive as to preclude the additional burdens sought to be imposed here by assessing the taxes in question against Pinetop for operations that are conducted solely on BIA and tribal roads within the reservation. Pp. 145-149.

(c) Imposition of the taxes in question would undermine the federal policy of assuring that the profits from timber sales would inure to the Tribe's benefit; would also undermine the Secretary of the Interior's ability to make the wide range of determinations committed to his authority concerning the setting of fees and rates with respect to the harvesting and sale of tribal timber; and would adversely affect the Tribe's ability to comply with the sustained-yield management policies imposed by federal law. Pp. 149-150.

(d) Respondents' generalized interest in raising revenue is insufficient, in the context of this case, to permit its proposed intrusion into the federal regulatory scheme with respect to the harvesting and sale of tribal timber. P. 150.

120 Ariz. 282, 585 P.2d 891, reversed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C.J., and BRENNAN, WHITE, BLACKMUN, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion, post, p. 170. STEVENS, J., filed a dissenting opinion, in which STEWART and REHNQUIST, JJ., joined, post, p. 153.

TOP

Opinion

MR. JUSTICE MARSHALL delivered the opinion of the Court.

In this case, we are once again called upon to consider the extent of state authority over the activities of non-Indians engaged in commerce on an Indian reservation. The State of Arizona seeks to apply its motor carrier license and use fuel taxes to petitioner Pinetop Logging Co. (Pinetop), an enterprise consisting of two non-Indian corporations authorized to do business in Arizona and operating solely on the Fort Apache Reservation. Pinetop and petitioner White Mountain Apache Tribe contend that the taxes are preempted by federal law or, alternatively, that they represent an unlawful infringement on tribal self-government. The Arizona Court of Appeals rejected petitioners' claims. We hold that the taxes are preempted by federal law, and we therefore reverse.

I

The 6,500 members of petitioner White Mountain Apache Tribe reside on the Fort Apache Reservation in a mountainous and forested region of northeastern Arizona. The Tribe is organized under a constitution approved by the Secretary of the Interior under the Indian Reorganization Act, 25 U.S.C. § 476. The revenue used to fund the Tribe's governmental programs is derived almost exclusively from tribal enterprises. Of these enterprises, timber
operations have proved by far the most important, accounting for over 90% of the Tribe's total annual profits. [n2]

The Fort Apache Reservation occupies over 1,650,000 acres, including 720,000 acres of commercial forest. Approximately 300,000 acres are used for the harvesting of timber on a "sustained yield" basis, permitting each area to be cut every 20 years without endangering the forest's continuing productivity. Under federal law, timber on reservation land is owned by the United States for the benefit of the Tribe, and cannot be harvested for sale without the consent of Congress. [p139] Acting under the authority of 25 CFR § 141.6 (1979) and the tribal constitution, and with the specific approval of the Secretary of the Interior, the Tribe in 1964 organized the Fort Apache Timber Co. (FATCO), a tribal enterprise that manages, harvests, processes, and sells timber. FATCO, which conducts all of its activities on the reservation, was created with the aid of federal funds. It employs about 300 tribal members.

The United States has entered into contracts with FATCO, authorizing it to harvest timber pursuant to regulations of the Bureau of Indian Affairs. FATCO has itself contracted with six logging companies, including Pinetop, which perform certain operations that FATCO could not carry out as economically on its own. [n3] Since it first entered into agreements with FATCO in 1969, Pinetop has been required to fell trees, cut them to the correct size, and transport them to FATCO's sawmill in return for a contractually specified fee. Pinetop employs approximately 50 tribal members. Its activities, performed solely on the Fort Apache Reservation, are subject to extensive federal control.


Pinetop paid the taxes under protest, [n5] and then brought suit in state court, asserting that, under federal law, the taxes could not lawfully be imposed on logging activities conducted exclusively within the reservation or on hauling activities on Bureau of Indian Affairs and tribal roads. [n6] The Tribe agreed to reimburse Pinetop for any tax liability incurred as a result of its on-reservation business activities, and the Tribe intervened in the action as a plaintiff. [n7]

Both petitioners and respondents moved for summary judgment on the issue of the applicability of the two taxes to Pinetop. Petitioners submitted supporting affidavits from the manager of FATCO, the head forester of the Bureau of Indian Affairs, and the Chairman of the White Mountain Apache Tribal Council; respondents offered no affidavits disputing [p140] the factual assertions by petitioners' affiants. The trial court awarded summary judgment to respondents, [n8] the Tribe appealed to the Arizona Court of Appeals. The Court of Appeals rejected petitioners' preemption claim. 120 Ariz. 282, 585 P.2d 891 (1978). Purporting to apply the test set forth in Pennsylvania v. Nelson, 350 U.S. 497 (1956), the court held that the taxes did not
conflict with federal regulation of tribal timber, that the federal interest was not so dominant as to preclude assessment of the challenged state taxes, and that the federal regulatory scheme did not "occupy the field." The court also concluded that the state taxes would not unlawfully infringe on tribal self-government. The Arizona Supreme Court declined to review the decision of the Court of Appeals. We granted certiorari. 444 U.S. 823 (1980).

II

Although "[g]eneralizations on this subject have become . . . treacherous," Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973), our decisions establish several basic principles with respect to the boundaries between state regulatory authority and tribal self-government. Long ago, the Court departed from Mr. Chief Justice Marshall's view that "the laws of [a State] can have no force" within reservation boundaries, Worcester v. Georgia, 6 Pet. 515, 561 (1832). See Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 481-483 (1976); New York ex rel. Ray v. Martin, 326 U.S. 498 (1946); Utah & Northern R. Co. v. Fisher, 116 U.S. 28 (1885). At the same time, we have recognized that he Indian tribes retain "attributes of sovereignty over both their members and their territory." United States v. Mazurie, 419 U.S. 544, 557 (1975). See also United States v. Wheeler, 435 U.S. 313, 323 (1978); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1978). As a result, there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members. The status of the tribes has been described as "an anomalous one and of complex character," for, despite their partial assimilation into American culture, the tribes have retained

"a semi-independent position . . ., not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided."


Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art. 1, § 8, cl 3. See United States v. Wheeler, supra at 322-323. This congressional authority and the "semi-independent position" of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be preempted by federal law. See, e.g., Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965); McClanahan v. Arizona State Tax Comm'n, supra. Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." Williams v. Lee, 358 U.S. 217, 220 (1959). See also Washington v. Yakima Indian Nation, 439 U.S. 463, 502 (1979); Fisher v. District Court, 424 U.S. 382 (1976) (per curiam); Kennerly v. District Court of Montana, 400 U.S. 423 (1971). The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important "backdrop," McClanahan v. Arizona State Tax Comm'n, supra at 172, against which vague or ambiguous federal enactments must always be measured.
The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of preemption that have emerged in other areas of the law. Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of preemption that are properly applied to the other. The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been preempted by operation of federal law. Moe v. Salish & Kootenai Tribes, supra at 475. As we have repeatedly recognized, this tradition is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development. [n10] Ambiguities in federal [p144] law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence. See McClanahan v. Arizona State Tax Comm’n, supra at 174-175, and n. 13. We have thus rejected the proposition that, in order to find a particular state law to have been preempted by operation of federal law, an express congressional statement to that effect is required. [n11] Warren Trading Post Co. v. Arizona Tax Comm’n, supra. At the same time, any applicable regulatory interest of the State must be given weight, McClanahan v. Arizona State Tax Comm’n, supra at 171, and "automatic exemptions ‘as a matter of constitutional law’" are unusual. Moe v. Salish & Kootenai Tribes, 425 U.S. at 481, n. 17.

When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal, and the federal interest in encouraging tribal self-government is at its strongest. See Moe v. Salish & Kootenai Tribes, supra at 480-481; McClanahan v. Arizona State Tax Comm’n. More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. In such cases, we have examined the language of the relevant federal treaties and statutes in terms of both the broad [p145] policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law. Compare Warren Trading Post Co. v. Arizona Tax Comm’n, supra, and Williams v. Lee, supra, with Moe v. Salish & Kootenai Tribes, supra, and Thomas v. Gay, 169 U.S. 264 (1898). Cf. McClanahan v. Arizona State Tax Comm’n, 411 U.S. at 171; Mescalero Apache Tribe v. Jones, 411 U.S. at 148.

III

With these principles in mind, we turn to the respondents' claim that they may, consistent with federal law, impose the contested motor vehicle license and use fuel taxes on the logging and hauling operations of petitioner Pinetop. At the outset, we observe that the Federal Government's regulation of the harvesting of Indian timber is comprehensive. That regulation takes the form of Acts of Congress, detailed regulations promulgated by the Secretary of the Interior, and day-to-day supervision by the Bureau of Indian Affairs. Under 25 U.S.C. §§ 405-407, the Secretary of the Interior is granted broad authority over the sale of timber on the reservation. [n12] [p146] Timber on Indian land may be sold only with the consent of the Secretary, and the proceeds from any such sales, less administrative expenses incurred by the Federal Government, are to be used for the benefit of the Indians or transferred to the Indian owner. Sales of timber must "be based upon a consideration of the needs and best interests of the
Indian owner and his heirs." 25 U.S.C. § 406(a). The statute specifies the factors which the Secretary must consider in making that determination. In order to assure the continued productivity of timber-producing land on tribal reservations, timber on unallotted lands "may be sold in accordance with the principles of sustained yield." 25 U.S.C. § 407. The Secretary is granted power to determine the disposition of the proceeds from timber sales. He is authorized to promulgate regulations for the operation and management of Indian forestry units. 25 U.S.C. § 466.

Acting pursuant to this authority, the Secretary has promulgated a detailed set of regulations to govern the harvesting and sale of tribal timber. Among the stated objectives of the regulations is the development of Indian forests by the Indian people for the purpose of promoting self-sustaining communities, to the end that the Indians may receive from their own property not only the stumpage value, but also the benefit of whatever profit it is capable of yielding and whatever labor the Indians are qualified to perform.

25 CFR § 141.3(a)(3) (1979). The regulations cover a wide variety of matters: for example, they restrict clear-cutting, § 141.5; establish comprehensive guidelines for the sale of timber, § 141.7; regulate the advertising of timber sales, §§ 141.8, 141.9; specify the manner in which bids may be accepted and rejected, § 141.11; describe the circumstances in which contracts may be entered into, §§ 141.12, 141.13; require the approval of all contracts by the Secretary, § 141.13; call for timber-cutting permits to be approved by the Secretary, § 141.19; specify fire protective measures, § 141.21; and provide a board of administrative appeals, § 141.23. Tribes are expressly authorized to establish commercial enterprises for the harvesting and logging of tribal timber. § 141.6.

Under these regulations, the Bureau of Indian Affairs exercises literally daily supervision over the harvesting and management of tribal timber. In the present case, contracts between FATCO and Pinetop must be approved by the Bureau; indeed, the record shows that some of those contracts were drafted by employees of the Federal Government. Bureau employees regulate the cutting, hauling, and marking of timber by FATCO and Pinetop. The Bureau decides such matters as how much timber will be cut, which trees will be felled, which roads are to be used, which hauling equipment Pinetop should employ, the speeds at which logging equipment may travel, and the width, length, height, and weight of loads.

The Secretary has also promulgated detailed regulations governing the roads developed by the Bureau of Indian Affairs. 25 CFR Part 162 (1979). Bureau roads are open to "free public use." § 162.8. Their administration and maintenance are funded by the Federal Government, with contributions from the Indian tribes. §§ 162.6-162.6a. On the Fort Apache Reservation, the Forestry Department of the Bureau has required FATCO and its contractors, including Pinetop, to repair and maintain existing Bureau and tribal roads and in some cases to construct new logging roads. Substantial sums have been spent for these purposes. In its federally approved contract with FATCO, Pinetop has agreed to construct new roads and to repair existing ones. A high percentage of Pinetop's receipts are expended for those purposes, and it has maintained separate personnel and equipment to carry out a variety of tasks relating to road maintenance.
In these circumstances, we agree with petitioner that the federal regulatory scheme is so pervasive as to preclude the additional burdens sought to be imposed in this case. Respondents seek to apply their motor vehicle license and use fuel taxes on Pinetop for operations that are conducted solely on Bureau and tribal roads within the reservation. [n14] There is no room for these taxes in the comprehensive federal regulatory scheme. In a variety of ways, the assessment of state taxes would obstruct federal policies. And equally important, respondents have been unable to identify any regulatory function or service performed by the State that would justify [p149] the assessment of taxes for activities on Bureau and tribal roads within the reservation.

At the most general level, the taxes would threaten the overriding federal objective of guaranteeing Indians that they will "receive . . . the benefit of whatever profit [the forest] is capable of yielding. . . ." 25 CFR § 141.3(a)(3) (1979). Underlying the federal regulatory program rests a policy of assuring that the profits derived from timber sales will inure to the benefit of the Tribe, subject only to administrative expenses incurred by the Federal Government. That objective is part of the general federal policy of encouraging tribes "to revitalize their self-government" and to assume control over their "business and economic affairs." Mescalero Apache Tribe v. Jones, 411 U.S. at 151. The imposition of the taxes at issue would undermine that policy in a context in which the Federal Government has undertaken to regulate the most minute details of timber production and expressed a firm desire that the Tribe should retain the benefits derived from the harvesting and sale of reservation timber.

In addition, the taxes would undermine the Secretary's ability to make the wide range of determinations committed to his authority concerning the setting of fees and rates with respect to the harvesting and sale of tribal timber. The Secretary reviews and approves the terms of the Tribe's agreements with its contractors, sets fees for services rendered to the Tribe by the Federal Government, and determines stumpage rates for timber to be paid to the Tribe. Most notably, in reviewing or writing the terms of the contracts between FATCO and its contractors, federal agents must predict the amount and determine the proper allocation of all business expenses, including fuel costs. The assessment of state taxes would throw additional factors into the federal calculus reducing tribal revenues and diminishing the profitability of the enterprise for potential contractors.

Finally, the imposition of state taxes would adversely affect the Tribe's ability to comply with the sustained [p150] yield management policies imposed by federal law. Substantial expenditures are paid out by the Federal Government, the Tribe, and its contractors in order to undertake a wide variety of measures to ensure the continued productivity of the forest. These measures include reforestation, fire control, wildlife promotion, road improvement, safety inspections, and general policing of the forest. The expenditures are largely paid for out of tribal revenues, which are in turn derived almost exclusively from the sale of timber. The imposition of state taxes on FATCO's contractors would effectively diminish the amount of those revenues, and thus leave the Tribe and its contractors with reduced sums with which to pay out federally required expenses.

As noted above, this is not a case in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall. Nor have respondents been able to identify a legitimate regulatory interest served by the taxes they seek to impose. They refer to a general desire to raise revenue, but we are unable to discern a responsibility or service that justifies the assertion of taxes imposed for on-reservation operations conducted solely on tribal and Bureau of Indian Affairs roads. Pinetop's business in Arizona is conducted solely on
the Fort Apache Reservation. Though at least the use fuel tax purports to "compensat[e] the state for the use of its highways," Ariz.Rev.Stat.Ann. § 28-1552 (Supp. 1979), no such compensatory purpose is present here. The roads at issue have been built, maintained, and policed exclusively by the Federal Government, the Tribe, and its contractors. We do not believe that respondents' generalized interest in raising revenue is in this context sufficient to permit its proposed intrusion into the federal regulatory scheme with respect to the harvesting and sale of tribal timber.

Respondents' argument is reduced to a claim that they may assess taxes on non-Indians engaged in commerce on the reservation whenever there is no express congressional statement [p151] to the contrary. That is simply not the law. In a number of cases we have held that state authority over non-Indians acting on tribal reservations is preempted, even though Congress has offered no explicit statement on the subject. See Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965); Williams v. Lee, 358 U.S. 217 (1958); Kennerly v. District Court of Montana, 400 U.S. 423 (1971). The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the preemption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits. "The cases in this Court have consistently guarded the authority of Indian governments over their reservations." United States v. Mazurie, 419 U.S. at 558, quoting Williams v. Lee, supra, at 223. Moreover, it is undisputed that the economic burden of the asserted taxes will ultimately fall on the Tribe. [n15] Where, as here, the Federal Government has undertaken comprehensive regulation of the harvesting and sale of tribal timber, where a number of the policies underlying the federal regulatory scheme are threatened by the taxes respondents seek to impose, and where respondents are unable to justify the taxes except in terms of a generalized interest in raising revenue, we believe that the proposed exercise of state authority is impermissible. [n16] [p152]

Both the reasoning and result in this case follow naturally from our unanimous decision in Warren Trading Post Co. v. Arizona Tax Comm'n, supra. There, the State of Arizona sought to impose a "gross proceeds" tax on a non-Indian company which conducted a retail trading business on the Navajo Indian Reservation. Referring to the tradition of sovereign power over the reservation, the Court held that the "comprehensive federal regulation of Indian traders" prohibited the assessment of the attempted taxes. Id. at 688. No federal statute, by its terms, precluded the assessment of state tax. Nonetheless, the "detailed regulations," specifying "in the most minute fashion," id. at 689, the licensing and regulation of Indian traders, were held to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders.

Id. at 690. The imposition of those burdens, we held, "could . . . disturb and disarrange the statutory plan" because the economic burden of the state taxes would eventually be passed on to the Indians themselves. Id. at 691. We referred to the fact that the Tribe had been largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities.

Id. at 690. And we emphasized that,
since federal legislation has left the State with no duties or responsibilities respecting the
reservation Indians, we cannot believe that Congress intended to leave to the State the privilege
of levying this tax.

Id. at 691. The present case, we conclude, [*p153*] is in all relevant respects indistinguishable
from Warren Trading Post.

The decision of the Arizona Court of Appeals is

Reversed.

[For concurring opinion of MR. JUSTICE POWELL, see post, p. 170.]

1.

The Fort Apache Reservation was originally established as the White Mountain Reservation by
an Executive Order signed by President Grant on November 9, 1871. By the Act of Congress of
June 7, 1897, 30 Stat. 64, the White Mountain Reservation was divided into the Fort Apache and
San Carlos Reservations.

2.

In 1973, for example, tribal enterprises showed a net profit of $1,667,091, $1,508,713 of which
was attributable to timber operations.

3.

FATCO initially attempted to perform some of its own logging and hauling operations, but found
itself unable to do these tasks economically.

4.

Respondents are the Arizona Highway Department, the Arizona Highway Commission, and
individual members of each entity.

5.

Between November, 1971, and May, 1976, Pinetop paid under protest $19,114.59 in use fuel
taxes and $14,701.42 in motor carrier license taxes. Since that time, it has continued to pay taxes
pending the outcome of this case. Refund litigation is pending in state court with respect to the
five other non-Indian contractors employed by the Tribe, and that litigation has been stayed
pending the outcome of this suit.

6.

For purposes of this action, petitioners have conceded Pinetop's liability for both motor carrier
license and use fuel taxes attributable to travel on state highways within the reservation. Pinetop
has maintained records of fuel attributable to travel on those highways, and computations would
evidently be made in order to allocate a portion of the gross receipts taxable under the motor
carrier license tax to state highways.
7. When Pinetop contracted to undertake timber operations for FATCO in 1969, both Pinetop and FATCO believed that it would not be required to pay state taxes. After respondents assessed the taxes at issue, FATCO agreed to pay them to avoid the loss of Pinetop’s services.

8. After the trial court entered summary judgment on the issue of the applicability of the state taxes, the case proceeded to trial on the state law issue of the manner of calculating the motor vehicle license tax. Final judgment was entered for respondents on all issues after trial. The Arizona Court of Appeals reversed the decision of the Superior Court on the calculation of the motor vehicle license tax. 120 Ariz. 282, 291, 585 P.2d 891, 900 (1978).


10. For example, the Indian Financing Act of 1974, 25 U.S.C. § 1451 et seq., states:

It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities.

Similar policies underlie the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 et seq., as well as the Indian Reorganization Act of 1934, 25 U.S.C. § 461 et seq., whose intent and purpose . . . was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism."


11. In the case of "Indians going beyond reservation boundaries," however, a "nondiscriminatory state law" is generally applicable in the absence of "express federal law to the contrary." Mescalero Apache Tribe v. Jones, supra at 148-149.

12.
Federal policies with respect to tribal timber have a long history. In United States v. Cook, 19 Wall. 591 (1874), and Pine River Logging Co. v. United States, 186 U.S. 279 (1902), the Court held that tribal members had no right to sell timber on reservation land unless the sale was related to the improvement of the land. At the same time, the Court interpreted the governing statute as designed to permit deserving Indians, who had no other sufficient means of support, to cut . . . a limited quantity of . . . timber . . . and to use the proceeds for their support . . . , provided that 10 percent of the gross proceeds should go to the stumpage or poor fund of the tribe, from which the old, sick and otherwise helpless might be supported.

Id. at 285-286.


[under . . . established principles applicable to land reservations created for the benefit of the Indian tribes, the Indians are beneficial owners of the land and the timber standing upon it and of the proceeds of their sale, subject to the plenary power of control by the United States, to be exercised for the benefit and protection of the Indians.


13.

Those factors include

(1) the state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs, (2) the highest and the best use of the land, including the advisability and practicality of devoting it to other uses for the benefit of the owner and his heirs, and (3) the present and future financial needs of the owner and his heirs.


14.

In oral argument, counsel for respondents appeared to concede that the asserted state taxes could not lawfully be applied to tribal roads, and was unwilling to defend the contrary conclusion of the court below, which made no distinction between Bureau and tribal roads under state and federal law. Tr. of Oral Arg. 337. Contrary to respondents' position throughout the litigation and in their brief in this Court, counsel limited his argument to a contention that the taxes could be asserted on the roads of the Bureau of Indian Affairs. Ibid. For purposes of federal preemption, however, we see no basis, and respondents point to none, for distinguishing between roads maintained by the Tribe and roads maintained by the Bureau of Indian Affairs.

15.
Of course, the fact that the economic burden of the tax falls on the Tribe does not, by itself, mean that the tax is preempted, as Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976), makes clear. Our decision today is based on the preemptive effect of the comprehensive federal regulatory scheme, which, like that in Warren Trading Post Co. v. Arizona Tax Comm’n, 380 U.S. 685 (1965), leaves no room for the additional burdens sought to be imposed by state law.

16.

Respondents also contend that the taxes are authorized by the Buck Act, 4 U.S.C. § 105 et seq., and the Hayden-Cartwright Act, 4 U.S.C. § 104. In Warren Trading Post Co. v. Arizona Tax Comm’n, supra at 691, n. 18, we squarely held that the Buck Act did not apply to Indian reservations, and respondents present no sufficient reason for us to depart from that holding. We agree with petitioners that the Hayden-Cartwright Act, which authorizes state taxes "on United States military or other reservations," was not designed to overcome the otherwise preemptive effect of federal regulation of tribal timber. We need not reach the more general question whether the Hayden-Cartwright Act applies to Indian reservations at all.
The State of Michigan, petitioner, entered into a compact with respondent Bay Mills Indian Community pursuant to the Indian Gaming Regulatory Act (IGRA). See 25 U. S. C. §2710(d)(1)(C). The compact authorizes Bay Mills to conduct class III gaming activities (i.e., to operate a casino) on Indian lands located within the State’s borders, but prohibits it from doing so outside that territory. Bay Mills later opened a second casino on land it had purchased through a congressionally established land trust. The Tribe claimed it could operate a casino there because the property qualified as Indian land. Michigan disagreed and sued the Tribe under §2710(d)(7)(A)(ii), which allows a State to enjoin “class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact.” The District Court granted the injunction, but the Sixth Circuit vacated. It held that tribal sovereign immunity barred the suit unless Congress provided otherwise, and that §2710(d)(7)(A)(ii) only authorized suits to enjoin gaming activity located “on Indian lands,” whereas Michigan’s complaint alleged the casino was outside such territory.

Held: Michigan’s suit against Bay Mills is barred by tribal sovereign immunity. Pp. 4–21.

(a) As “‘domestic dependent nations,’” Indian tribes exercise “inherent sovereign authority” that is subject to plenary control by Congress. Oklahoma Tax Comm’n v. Citizen Band Potawatomi Tribe of Okla., 498 U. S. 505, 509. Unless and “until Congress acts, the tribes retain” their historic sovereign authority. United States v. Wheeler, 435 U. S. 313, 323. Among the core aspects of sovereignty that tribes possess—subject to congressional action—is the “common-law immunity from suit traditionally enjoyed by sovereign powers.” Santa Clara Pueblo v. Martinez, 436 U. S. 49, 58. That immunity applies

(b) IGRA’s plain terms do not authorize this suit. Section 2710(d)(7)(A)(ii) partially abrogates tribal immunity with respect to class III gaming located “on Indian lands,” but the very premise of Michigan’s suit is that Bay Mills’ casino is unlawful because it is outside Indian lands. Michigan argues that the casino is authorized, licensed, and operated from within the reservation, and that such administrative action constitutes “class III gaming activity.” However, numerous other IGRA provisions make clear that “class III gaming activity” refers to the gambling that goes on in a casino, not the off-site licensing of such games. See, e.g., §§2710(d)(3)(C)(i), (d)(9). IGRA’s history and design also explain why Congress would have authorized a State to enjoin illegal tribal gaming on Indian lands but not on lands subject to the State’s own sovereign jurisdiction. Congress adopted IGRA in response to California v. Cabazon Band of Mission Indians, 480 U. S. 202, 221–222, which held that States lacked regulatory authority over gaming on Indian lands but left intact States’ regulatory power over tribal gaming outside Indian territory. A State therefore has many tools to enforce its law on state land that it does not possess in Indian territory, including, e.g., bringing a civil or criminal action against tribal officials rather than the tribe itself for conducting illegal gaming. A State can also use its leverage in negotiating an IGRA compact to bargain for a waiver of the tribe’s immunity. Pp. 8–14.

(c) Michigan urges the Court to overrule Kiowa and hold that tribal immunity does not apply to commercial activity outside Indian territory. However, “any departure” from precedent “demands special justification,” Arizona v. Rumsey, 467 U. S. 203, 212, and Michigan offers nothing more than arguments already rejected in Kiowa. Kiowa rejected these arguments because it is fundamentally Congress’s job to determine whether or how to limit tribal immunity; Congress had restricted tribal immunity “in limited circumstances” like §2710(d)(7)(A)(iii), while “in other statutes” declaring an “intention not to alter it.” 523 U. S., at 758. Kiowa therefore chose to “defer to the role Congress may wish to exercise in this important judgment.” Ibid. Congress has since reflected on Kiowa and decided to retain tribal immunity in a case like this. Having held that the issue is up to Congress, the Court cannot reverse itself now simply because some

695 F. 3d 406, affirmed and remanded.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, and SOTOMAYOR, JJ., joined. SOTOMAYOR, J., filed a concurring opinion. SCALIA, J., filed a dissenting opinion. THOMAS, J., filed a dissenting opinion, in which SCALIA, GINSBURG, and ALITO, JJ., joined. GINSBURG, J., filed a dissenting opinion.
The question in this case is whether tribal sovereign immunity bars Michigan’s suit against the Bay Mills Indian Community for opening a casino outside Indian lands. We hold that immunity protects Bay Mills from this legal action. Congress has not abrogated tribal sovereign immunity from a State’s suit to enjoin gaming off a reservation or other Indian lands. And we decline to revisit our prior decisions holding that, absent such an abrogation (or a waiver), Indian tribes have immunity even when a suit arises from off-reservation commercial activity. Michigan must therefore resort to other mechanisms, including legal actions against the responsible individuals, to resolve this dispute.

I

The Indian Gaming Regulatory Act (IGRA or Act), 102 Stat. 2467, 25 U. S. C. §2701 et seq., creates a framework for regulating gaming activity on Indian lands. See

1The Act defines “Indian lands” as “(A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held
Opinion of the Court

§2702(3) (describing the statute’s purpose as establishing “regulatory authority . . . [and] standards for gaming on Indian lands”). The Act divides gaming into three classes. Class III gaming, the most closely regulated and the kind involved here, includes casino games, slot machines, and horse racing. See §2703(8). A tribe may conduct such gaming on Indian lands only pursuant to, and in compliance with, a compact it has negotiated with the surrounding State. See §2710(d)(1)(C). A compact typically prescribes rules for operating gaming, allocates law enforcement authority between the tribe and State, and provides remedies for breach of the agreement’s terms. See §§2710(d)(3)(C)(ii), (v). Notable here, IGRA itself authorizes a State to bring suit against a tribe for certain conduct violating a compact: Specifically, §2710(d)(7)(A)(ii) allows a State to sue in federal court to “enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact . . . that is in effect.”

Pursuant to the Act, Michigan and Bay Mills, a federally recognized Indian Tribe, entered into a compact in 1993. See App. to Pet. for Cert. 73a–96a. The compact empowers Bay Mills to conduct class III gaming on “Indian lands”; conversely, it prohibits the Tribe from doing so outside that territory. Id., at 78a, 83a; see n. 1, supra.

The compact also contains a dispute resolution mechanism, which sends to arbitration any contractual differences the parties cannot settle on their own. See App. to Pet. for Cert. 89a–90a. A provision within that arbitration section states that “[n]othing in this Compact shall be deemed a waiver” of either the Tribe’s or the State’s sovereign immunity. Id., at 90a. Since entering into the com-

in trust by the United States for the benefit of any Indian tribe or individual[,] or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.” §2703(4).
Opinion of the Court

In 2010, Bay Mills opened another class III gaming facility in Vanderbilt, a small village in Michigan’s Lower Peninsula about 125 miles from the Tribe’s reservation. Bay Mills had bought the Vanderbilt property with accrued interest from a federal appropriation, which Congress had made to compensate the Tribe for 19th-century takings of its ancestral lands. See Michigan Indian Land Claims Settlement Act, 111 Stat. 2652. Congress had directed that a portion of the appropriated funds go into a “Land Trust” whose earnings the Tribe was to use to improve or purchase property. According to the legislation, any land so acquired “shall be held as Indian lands are held.” §107(a)(3), id., at 2658. Citing that provision, Bay Mills contended that the Vanderbilt property was “Indian land” under IGRA and the compact; and the Tribe thus claimed authority to operate a casino there.

Michigan disagreed: The State sued Bay Mills in federal court to enjoin operation of the new casino, alleging that the facility violated IGRA and the compact because it was located outside Indian lands. The same day Michigan filed suit, the federal Department of the Interior issued an opinion concluding (as the State’s complaint said) that the Tribe’s use of Land Trust earnings to purchase the Vanderbilt property did not convert it into Indian territory. See App. 69–101. The District Court entered a preliminary injunction against Bay Mills, which promptly shut down the new casino and took an interlocutory appeal. While that appeal was pending, Michigan amended its complaint to join various tribal officials as defendants, as well as to add state law and federal common law claims. The Court of Appeals for the Sixth Circuit then vacated the injunction, holding (among other things) that tribal sovereign immunity barred Michigan’s suit against Bay Mills unless Congress provided otherwise, and that
Opinion of the Court

§2710(d)(7)(A)(ii) did not authorize the action. See 695 F. 3d 406, 413–415 (2012). That provision of IGRA, the Sixth Circuit reasoned, permitted a suit against the Tribe to enjoin only gaming activity located on Indian lands, whereas the State’s complaint alleged that the Vanderbilt casino was outside such territory. See id., at 412. Accordingly, the Court of Appeals concluded that Michigan could proceed, if at all, solely against the individual defendants, and it remanded to the District Court to consider those claims. See id., at 416–417. Although no injunction is currently in effect, Bay Mills has not reopened the Vanderbilt casino.

We granted certiorari to consider whether tribal sovereign immunity bars Michigan's suit against Bay Mills, 570 U. S. __ (2013), and we now affirm the Court of Appeals’ judgment.

II

Indian tribes are “‘domestic dependent nations’” that exercise “inherent sovereign authority.” Oklahoma Tax Comm’n v. Town of Norman, 518 U. S. 150, 160–161 (1996).}

2The Sixth Circuit framed part of its analysis in jurisdictional terms, holding that the District Court had no authority to consider Michigan’s IGRA claim because §2710(d)(7)(A)(ii) provides federal jurisdiction only over suits to enjoin gaming on Indian lands (and Michigan’s suit was not that). See 695 F. 3d, at 412–413. That reasoning is wrong, as all parties agree. See Brief for Michigan 22–25; Brief for Bay Mills 23–24; Brief for United States as Amicus Curiae 16–17. The general federal-question statute, 28 U. S. C. §1331, gives a district court subject matter jurisdiction to decide any claim alleging a violation of IGRA. Nothing in §2710(d)(7)(A)(ii) or any other provision of IGRA limits that grant of jurisdiction (although those provisions may indicate that a party has no statutory right of action). See Verizon Md. Inc. v. Public Serv. Comm’n of Md., 535 U. S. 635, 643–644 (2002).

3The Court of Appeals’ decision applied not only to Michigan’s case, but also to a consolidated case brought by the Little Traverse Bay Bands of Odawa Indians, which operates a casino about 40 miles from the Vanderbilt property. Little Traverse subsequently dismissed its suit, rather than seek review in this Court.
Opinion of the Court


Among the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the “common-law immunity from suit traditionally enjoyed by sovereign powers.” Santa Clara Pueblo, 436 U.S., at 58. That immunity, we have explained, is “a necessary corollary to Indian sovereignty and self-governance.” Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C., 476 U.S. 877, 890 (1986); cf. The Federalist No. 81, p. 511 (B. Wright ed. 1961) (A. Hamilton) (It is “inherent in the nature of sovereignty not to be amenable” to suit without consent). And the qualified nature of Indian sovereignty modifies that principle only by placing a tribe’s immunity, like its other governmental powers and attributes, in Congress’s hands. See United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512 (1940) (USF&G) (“It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit”). Thus, we have time and again treated the “doctrine of tribal immunity [as] settled law” and dismissed any suit against a tribe absent congressional authorization (or a waiver). Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc., 523 U.S. 751, 756 (1998).

In doing so, we have held that tribal immunity applies
Opinion of the Court

no less to suits brought by States (including in their own courts) than to those by individuals. First in *Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U. S. 165, 167–168, 172–173 (1977), and then again in *Potawatomi*, 498 U. S., at 509–510, we barred a State seeking to enforce its laws from filing suit against a tribe, rejecting arguments grounded in the State’s own sovereignty. In each case, we said a State must resort to other remedies, even if they would be less “efficient.” *Id.*, at 514; see *Kiowa*, 523 U. S., at 755 (“There is a difference between the right to demand compliance with state laws and the means available to enforce them”). That is because, as we have often stated (and contrary to the dissent’s novel pronouncement, see *post*, at 3 (opinion of THOMAS, J.) (hereinafter the dissent)), tribal immunity “is a matter of federal law and is not subject to diminution by the States.” 523 U. S., at 756 (citing *Three Affiliated Tribes*, 476 U. S., at 891; *Washington v. Confederated Tribes of Colville Reservation*, 447 U. S. 134, 154 (1980)). Or as we elsewhere explained: While each State at the Constitutional Convention surrendered its immunity from suit by sister States, “it would be absurd to suggest that the tribes”—at a conference “to which they were not even parties”—similarly ceded their immunity against state-initiated suits. *Blatchford v. Native Village of Noatak*, 501 U. S. 775, 782 (1991).

Equally important here, we declined in *Kiowa* to make any exception for suits arising from a tribe’s commercial activities, even when they take place off Indian lands. In that case, a private party sued a tribe in state court for defaulting on a promissory note. The plaintiff asked this Court to confine tribal immunity to suits involving conduct on “reservations or to noncommercial activities.” 523 U. S., at 758. We said no. We listed *Puyallup*, *Potawatomi*, and USF&G as precedents applying immunity to a suit predicated on a tribe’s commercial conduct—
respectively, fishing, selling cigarettes, and leasing coal mines. 523 U. S., at 754–755. Too, we noted that Puyallup involved enterprise “both on and off [the Tribe’s] reservation.” 523 U. S., at 754 (quoting 433 U. S., at 167). “[O]ur precedents,” we thus concluded, have not previously “drawn the[ ] distinctions” the plaintiff pressed in the case. 523 U. S., at 755. They had established a broad principle, from which we thought it improper suddenly to start carving out exceptions. Rather, we opted to “defer” to Congress about whether to abrogate tribal immunity for off-reservation commercial conduct. Id., at 758, 760; see infra, at 17–18.

Our decisions establish as well that such a congressional decision must be clear. The baseline position, we have often held, is tribal immunity; and “[t]o abrogate [such] immunity, Congress must ‘unequivocally’ express that purpose.” C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla., 532 U. S. 411, 418 (2001) (quoting Santa Clara Pueblo, 436 U. S., at 58). That rule of construction reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government. See, e.g., id., at 58–60; Iowa Mut. Ins. Co. v. LaPlante, 480 U. S. 9, 18 (1987); United States v. Dion, 476 U. S. 734, 738–739 (1986).

The upshot is this: Unless Congress has authorized Michigan’s suit, our precedents demand that it be dismissed.4 And so Michigan, naturally enough, makes two arguments: first, that IGRA indeed abrogates the Tribe’s immunity from the State’s suit; and second, that if it does not, we should revisit—and reverse—our decision in

4Michigan does not argue here that Bay Mills waived its immunity from suit. Recall that the compact expressly preserves both the Tribe’s and the State’s sovereign immunity. See supra, at 2.
Kiowa, so that tribal immunity no longer applies to claims arising from commercial activity outside Indian lands. We consider—and reject—each contention in turn.

III

IGRA partially abrogates tribal sovereign immunity in §2710(d)(7)(A)(ii)—but this case, viewed most naturally, falls outside that term’s ambit. The provision, as noted above, authorizes a State to sue a tribe to “enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact.” See supra, at 2; Kiowa, 523 U. S., at 758 (citing the provision as an example of legislation “restrict[ing] tribal immunity from suit in limited circumstances”). A key phrase in that abrogation is “on Indian lands”—three words reflecting IGRA’s overall scope (and repeated some two dozen times in the statute). A State’s suit to enjoin gaming activity on Indian lands (assuming other requirements are met, see n. 6, infra) falls within §2710(d)(7)(A)(ii); a similar suit to stop gaming activity off Indian lands does not. And that creates a fundamental problem for Michigan. After all, the very premise of this suit—the reason Michigan thinks Bay Mills is acting unlawfully—is that the Vanderbilt casino is outside Indian lands. See App. to Pet. for Cert. 59a–60a. By dint of that theory, a suit to enjoin gaming in Vanderbilt is correspondingly outside §2710(d)(7)(A)(ii)’s abrogation of immunity.

Michigan first attempts to fit this suit within §2710(d)(7)(A)(ii) by relocating the “class III gaming activity” to which it is objecting. True enough, Michigan states, the Vanderbilt casino lies outside Indian lands. But Bay Mills “authorized, licensed, and operated” that casino from within its own reservation. Brief for Michigan 20. According to the State, that necessary administrative action—no less than, say, dealing craps—is “class III gaming activity,” and because it occurred on Indian land, this suit to
enjoin it can go forward.

But that argument comes up snake eyes, because numerous provisions of IGRA show that “class III gaming activity” means just what it sounds like—the stuff involved in playing class III games. For example, §2710(d)(3)(C)(i) refers to “the licensing and regulation of [a class III gaming] activity” and §2710(d)(9) concerns the “operation of a class III gaming activity.” Those phrases make perfect sense if “class III gaming activity” is what goes on in a casino—each roll of the dice and spin of the wheel. But they lose all meaning if, as Michigan argues, “class III gaming activity” refers equally to the off-site licensing or operation of the games. (Just plug in those words and see what happens.) See also §§2710(b)(2)(A), (b)(4)(A), (c)(4), (d)(1)(A) (similarly referring to class II or III “gaming activity”). The same holds true throughout the statute. Section 2717(a)(1) specifies fees to be paid by “each gaming operation that conducts a class II or class III gaming activity”—signifying that the gaming activity is the gambling in the poker hall, not the proceedings of the off-site administrative authority. And §§2706(a)(5) and 2713(b)(1) together describe a federal agency’s power to “close a gaming activity” for “substantial violation[s]” of law—e.g., to shut down crooked blackjack tables, not the tribal regulatory body meant to oversee them. Indeed, consider IGRA’s very first finding: Many tribes, Congress stated, “have licensed gaming activities on Indian lands,” thereby necessitating federal regulation. §2701(1). The “gaming activity[ies]” is (once again) the gambling. And that means §2710(d)(7)(A)(ii) does not allow Michigan’s suit even if Bay Mills took action on its reservation to license or oversee the Vanderbilt facility.

Stymied under §2710(d)(7)(A)(ii), Michigan next urges us to adopt a “holistic method” of interpreting IGRA that would allow a State to sue a tribe for illegal gaming off, no less than on, Indian lands. Brief for Michigan 30. Michi-
gan asks here that we consider “IGRA’s text and structure as a whole.” *Id.*, at 28. But (with one briefly raised exception) Michigan fails to identify any specific textual or structural features of the statute to support its proposed result.5 Rather, Michigan highlights a (purported) anomaly of the statute as written: that it enables a State to sue a tribe for illegal gaming inside, but not outside, Indian country. “[W]hy,” Michigan queries, “would Congress authorize a state to obtain a federal injunction against illegal tribal gaming on Indian lands, but not on lands subject to the state’s own sovereign jurisdiction?” Reply Brief 1. That question has no answer, Michigan argues: Whatever words Congress may have used in IGRA, it could not have intended that senseless outcome. See Brief for Michigan 28.

But this Court does not revise legislation, as Michigan proposes, just because the text as written creates an apparent anomaly as to some subject it does not address. Truth be told, such anomalies often arise from statutes, if

———

5 Michigan’s single reference to another statutory provision, 18 U. S. C. §1166, does not advance its argument, because that term includes a geographical limitation similar to the one appearing in §2710(d)(7)(A)(ii). Section 1166 makes a State’s gambling laws applicable “in Indian country” as federal law, and then gives the Federal Government “exclusive jurisdiction over criminal prosecutions” for violating those laws. 18 U. S. C. §1166(a), (d). Michigan briefly argues that, by negative implication, §1166 gives a State the power “to bring a civil suit to enforce [its] anti-gambling laws in Indian country,” and that this power applies “even when the defendant is an Indian tribe.” Brief for Michigan 26 (emphasis added). Bay Mills and the United States vigorously contest both those propositions, arguing that §1166 gives States no civil enforcement authority at all, much less as against a tribe. See Brief for Bay Mills 30–31; Brief for United States as *Amicus Curiae* 20–22. But that dispute is irrelevant here. Even assuming Michigan’s double inference were valid, §1166 would still allow a State to sue a tribe for gaming only “in Indian country.” So Michigan’s suit, alleging that illegal gaming occurred on state lands, could no more proceed under §1166 than under §2710(d)(7)(A)(ii).
Opinion of the Court

for no other reason than that Congress typically legislates by parts—addressing one thing without examining all others that might merit comparable treatment. Rejecting a similar argument that a statutory anomaly (between property and non-property taxes) made “not a whit of sense,” we explained in one recent case that “Congress wrote the statute it wrote”—meaning, a statute going so far and no further. See CSX Transp., Inc. v. Alabama Dept. of Revenue, 562 U. S. ___, ___ (2011) (slip op., at 17–18). The same could be said of IGRA’s abrogation of tribal immunity for gaming “on Indian lands.” This Court has no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that (in Michigan’s words) Congress “must have intended” something broader. Brief for Michigan 32. And still less do we have that warrant when the consequence would be to expand an abrogation of immunity, because (as explained earlier) “Congress must ‘unequivocally’ express [its] purpose” to subject a tribe to litigation. C & L Enterprises, 532 U. S., at 418; see supra, at 7.

In any event, IGRA’s history and design provide a more than intelligible answer to the question Michigan poses about why Congress would have confined a State’s authority to sue a tribe as §2710(d)(7)(A)(ii) does. Congress adopted IGRA in response to this Court’s decision in California v. Cabazon Band of Mission Indians, 480 U. S. 202, 221–222 (1987), which held that States lacked any regulatory authority over gaming on Indian lands. Cabazon left fully intact a State’s regulatory power over tribal gaming outside Indian territory—which, as we will soon show, is capacious. See infra, at 12–13. So the problem Congress set out to address in IGRA (Cabazon’s ouster of state authority) arose in Indian lands alone. And the solution Congress devised, naturally enough, reflected that fact. See, e.g., Seminole Tribe of Fla. v. Florida, 517 U. S. 44, 58 (1996) ("[T]he Act grants the States a power that they
would not otherwise have, viz., some measure of author-
ity over gaming on Indian lands”). Everything—literally
everything—in IGRA affords tools (for either state or
federal officials) to regulate gaming on Indian lands, and
nowhere else. Small surprise that IGRA’s abrogation of
tribal immunity does that as well.6

And the resulting world, when considered functionally,
is not nearly so “enigma[tic]” as Michigan suggests. Reply
Brief 1. True enough, a State lacks the ability to sue a
tribe for illegal gaming when that activity occurs off the
reservation. But a State, on its own lands, has many
other powers over tribal gaming that it does not possess
(absent consent) in Indian territory. Unless federal law
provides differently, “Indians going beyond reservation
boundaries” are subject to any generally applicable state
law. See Wagnon v. Prairie Band Potawatomi Nation, 546
Jones, 411 U. S. 145, 148 (1973)). So, for example, Michi-
gan could, in the first instance, deny a license to Bay Mills

6Indeed, the statutory abrogation does not even cover all suits to
enjoin gaming on Indian lands, thus refuting the very premise of
Michigan’s argument-from-anomaly. Section 2710(d)(7)(A)(ii), recall,
allows a State to sue a tribe not for all “class III gaming activity located
on Indian lands” (as Michigan suggests), but only for such gaming as is
“conducted in violation of any Tribal-State compact . . . that is in effect.”
Accordingly, if a tribe opens a casino on Indian lands before negotiating
a compact, the surrounding State cannot sue; only the Federal Gov-
ernment can enforce the law. See 18 U. S. C. §1166(d). To be precise,
then, IGRA’s authorization of suit mirrors not the full problem Cabazon
created (a vacuum of state authority over gaming in Indian country)
but, more particularly, Congress’s “carefully crafted” compact-based
solution to that difficulty. Seminole Tribe of Fla. v. Florida, 517 U. S.
44, 73–74 (1996). So Michigan’s binary challenge—if a State can sue to
stop gaming in Indian country, why not off?—fails out of the starting
gate. In fact, a State cannot sue to enjoin all gaming in Indian country;
that gaming must, in addition, violate an agreement that the State and
tribe have mutually entered.
Opinion of the Court

§§432.206–432.206a (West 2001). And if Bay Mills went ahead anyway, Michigan could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for, say, gambling without a license. See §432.220; see also §600.3801(1)(a) (West 2013) (designating illegal gambling facilities as public nuisances). As this Court has stated before, analogizing to Ex parte Young, 209 U. S. 123 (1908), tribal immunity does not bar such a suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct. See Santa Clara Pueblo, 436 U. S., at 59. And to the extent civil remedies proved inadequate, Michigan could resort to its criminal law, prosecuting anyone who maintains—or even frequents—an unlawful gambling establishment. See Mich. Comp. Laws Ann. §§432.218 (West 2001), 750.303, 750.309 (West 2004). In short (and contrary to the dissent’s unsupported assertion, see post, at 11), the panoply of tools Michigan can use to enforce its law on its own lands—no less than the suit it could bring on Indian lands under §2710(d)(7)(A)(ii)—can shutter, quickly and

Finally, if a State really wants to sue a tribe for gaming outside Indian lands, the State need only bargain for a waiver of immunity. Under IGRA, a State and tribe negotiating a compact “may include . . . remedies for breach of contract,” 25 U. S. C. §2710(d)(3)(C)(v)—including a provision allowing the State to bring an action against the tribe in the circumstances presented here. States have more

7Michigan contends that these alternative remedies may be more intrusive on, or less respectful of, tribal sovereignty than the suit it wants to bring. See Brief for Michigan 15; Tr. of Oral Arg. 18. Bay Mills, which presumably is better positioned to address that question, emphatically disagrees. See id., at 32–33. And the law supports Bay Mills’ position: Dispensing with the immunity of a sovereign for fear of pursuing available remedies against its officers or other individuals would upend all known principles of sovereign immunity.
than enough leverage to obtain such terms because a tribe cannot conduct class III gaming on its lands without a compact, see §2710(d)(1)(C), and cannot sue to enforce a State’s duty to negotiate a compact in good faith, see Seminole Tribe, 517 U. S., at 47 (holding a State immune from such suits). So as Michigan forthrightly acknowledges, “a party dealing with a tribe in contract negotiations has the power to protect itself by refusing to deal absent the tribe’s waiver of sovereign immunity from suit.” Brief for Michigan 40. And many States have taken that path. See Brief for Seminole Tribe of Florida et al. as Amici Curiae 12–22 (listing compacts with waivers of tribal immunity). To be sure, Michigan did not: As noted earlier, the compact at issue here, instead of authorizing judicial remedies, sends disputes to arbitration and expressly retains each party’s sovereign immunity. See supra, at 2. But Michigan—like any State—could have insisted on a different deal (and indeed may do so now for the future, because the current compact has expired and remains in effect only until the parties negotiate a new one, see Tr. of Oral Arg. 21). And in that event, the limitation Congress placed on IGRA’s abrogation of tribal immunity—whether or not anomalous as an abstract matter—would have made no earthly difference.

IV

Because IGRA’s plain terms do not abrogate Bay Mills’ immunity from this suit, Michigan (and the dissent) must make a more dramatic argument: that this Court should “revisit[ ] Kiowa’s holding” and rule that tribes “have no immunity for illegal commercial activity outside their sovereign territory.” Reply Brief 8, 10; see post, at 1. Michigan argues that tribes increasingly participate in off-reservation gaming and other commercial activity, and operate in that capacity less as governments than as private businesses. See Brief for Michigan 38 (noting,
among other things, that “tribal gaming revenues have more than tripled” since Kiowa). Further, Michigan contends, tribes have broader immunity from suits arising from such conduct than other sovereigns—most notably, because Congress enacted legislation limiting foreign nations’ immunity for commercial activity in the United States. See id., at 41; 28 U. S. C. §1605(a)(2). It is time, Michigan concludes, to “level[ ] the playing field.” Brief for Michigan 38.

But this Court does not overturn its precedents lightly. Stare decisis, we have stated, “is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” Payne v. Tennessee, 501 U. S. 808, 827 (1991). Although “not an inexorable command,” id., at 828, stare decisis is a foundation stone of the rule of law, necessary to ensure that legal rules develop “in a principled and intelligible fashion,” Vasquez v. Hillery, 474 U. S. 254, 265 (1986). For that reason, this Court has always held that “any departure” from the doctrine “demands special justification.” Arizona v. Rumsey, 467 U. S. 203, 212 (1984).

And that is more than usually so in the circumstances here. First, Kiowa itself was no one-off: Rather, in rejecting the identical argument Michigan makes, our decision reaffirmed a long line of precedents, concluding that “the doctrine of tribal immunity”—without any exceptions for commercial or off-reservation conduct—“is settled law and controls this case.” 523 U. S., at 756; see id., at 754–755; supra, at 5–7. Second, we have relied on Kiowa subsequently: In another case involving a tribe’s off-reservation commercial conduct, we began our analysis with Kiowa’s holding that tribal immunity applies to such activity (and then found that the Tribe had waived its protection). See C & L Enterprises, 532 U. S., at 418. Third, tribes across
the country, as well as entities and individuals doing business with them, have for many years relied on Kiowa (along with its forebears and progeny), negotiating their contracts and structuring their transactions against a backdrop of tribal immunity. As in other cases involving contract and property rights, concerns of stare decisis are thus “at their acme.” State Oil Co. v. Khan, 522 U. S. 3, 20 (1997). And fourth (a point we will later revisit, see infra, at 17–20), Congress exercises primary authority in this area and “remains free to alter what we have done”—another factor that gives “special force” to stare decisis. Patterson v. McLean Credit Union, 491 U. S. 164, 172–173 (1989). To overcome all these reasons for this Court to stand pat, Michigan would need an ace up its sleeve.8

But instead, all the State musters are retreads of assertions we have rejected before. Kiowa expressly considered the view, now offered by Michigan, that “when tribes take part in the Nation’s commerce,” immunity “extends beyond what is needed to safeguard tribal self-governance.” 523 U. S., at 758. (Indeed, as Kiowa noted, see id., at 757, Potawatomi had less than a decade earlier rejected Oklahoma’s identical contention that “because tribal business activities . . . are now so detached from traditional tribal interests,” immunity “no longer makes sense in [the commercial context],” 498 U. S., at 510.) So too, the Kiowa

8Adhering to stare decisis is particularly appropriate here given that the State, as we have shown, has many alternative remedies: It has no need to sue the Tribe to right the wrong it alleges. See supra, at 12–13. We need not consider whether the situation would be different if no alternative remedies were available. We have never, for example, specifically addressed (nor, so far as we are aware, has Congress) whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct. The argument that such cases would present a “special justification” for abandoning precedent is not before us. Arizona v. Rumsey, 467 U. S. 203, 212 (1984).
Court comprehended the trajectory of tribes’ commercial activity (which is the dissent’s exclusive rationale for ignoring stare decisis, see post, at 10–13). In the preceding decade, tribal gaming revenues had increased more than thirty fold (dwarfing the still strong rate of growth since that time, see supra, at 14–15); and Kiowa noted the flourishing of other tribal enterprises, ranging from cigarette sales to ski resorts, see 523 U. S., at 758. Moreover, the Kiowa Court understood that other sovereigns did not enjoy similar immunity for commercial activities outside their territory; that seeming “anomal[y]” was a principal point in the dissenting opinion. See id., at 765 (Stevens, J., dissenting). Kiowa did more, in fact, than acknowledge those arguments; it expressed a fair bit of sympathy toward them. See id., at 758 (noting “reasons to doubt the wisdom of perpetuating the doctrine” as to off-reservation commercial conduct). Yet the decision could not have been any clearer: “We decline to draw [any] distinction” that would “confine [immunity] to reservations or to noncommercial activities.” Ibid.

We ruled that way for a single, simple reason: because it is fundamentally Congress’s job, not ours, to determine whether or how to limit tribal immunity. The special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress. See Lara, 541 U. S., at 200; Wheeler, 435 U. S., at 323. Kiowa chose to respect that congressional responsibility (as Potawatomi had a decade earlier) when it rejected the precursor to Michigan’s argument: Whatever our view of the merits, we explained, “we defer to the role Congress may wish to exercise in this important judgment.” 523 U. S., at 758; see Potawatomi, 498 U. S., at 510 (stating that because

---

Opinion of the Court

“Congress has always been at liberty to dispense with” or limit tribal immunity, “we are not disposed to modify” its scope. Congress, we said—drawing an analogy to its role in shaping foreign sovereign immunity—has the greater capacity “to weigh and accommodate the competing policy concerns and reliance interests” involved in the issue. 523 U. S., at 759. And Congress repeatedly had done just that: It had restricted tribal immunity “in limited circumstances” (including, we noted, in §2710(d)(7)(A)(ii)), while “in other statutes” declaring an “intention not to alter” the doctrine. Id., at 758; see Potawatomi, 498 U. S., at 510 (citing statutory provisions involving tribal immunity). So too, we thought, Congress should make the call whether to curtail a tribe's immunity for off-reservation commercial conduct—and the Court should accept Congress's judgment.

All that we said in Kiowa applies today, with yet one

10Kiowa explained that Congress, in the Foreign Sovereign Immunities Act of 1976, 28 U. S. C. §1605(a)(2), “den[ied] immunity for the commercial acts of a foreign nation,” codifying an earlier State Department document, known as the Tate Letter, announcing that policy. 523 U. S., at 759. Michigan takes issue with Kiowa's account, maintaining that this Court took the lead in crafting the commercial exception to foreign sovereign immunity, and so should feel free to do the same thing here. See Reply Brief 6–7. But the decision Michigan cites, Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U. S. 682 (1976), does not show what the State would like. First, Michigan points to a part of the Dunhill opinion commanding only four votes, see id., at 695–706 (opinion of White, J.); the majority's decision was based on the act of state doctrine, not on anything to do with foreign sovereign immunity, see id., at 690–695. And second, even the plurality opinion relied heavily on the views of the Executive Branch as expressed in the Tate Letter—going so far as to attach that document as an appendix. See id., at 696–698 (opinion of White, J.); id., at 711–715 (appendix 2 to opinion of the Court). The opinion therefore illustrates what Kiowa highlighted: this Court's historic practice of “deferr[ing] to the decisions of the political branches,” rather than going it alone, when addressing foreign sovereign immunity. Verlinden B. V. v. Central Bank of Nigeria, 461 U. S. 480, 486 (1983).
more thing: Congress has now reflected on Kiowa and made an initial (though of course not irrevocable) decision to retain that form of tribal immunity. Following Kiowa, Congress considered several bills to substantially modify tribal immunity in the commercial context. Two in particular—drafted by the chair of the Senate Appropriations Subcommittee on the Interior—expressly referred to Kiowa and broadly abrogated tribal immunity for most torts and breaches of contract. See S. 2299, 105th Cong., 2d Sess. (1998); S. 2302, 105th Cong., 2d Sess. (1998). But instead of adopting those reversals of Kiowa, Congress chose to enact a far more modest alternative requiring tribes either to disclose or to waive their immunity in contracts needing the Secretary of the Interior’s approval. See Indian Tribal Economic Development and Contract Encouragement Act of 2000, §2, 114 Stat. 46 (codified at 25 U. S. C. §81(d)(2)); see also F. Cohen, Handbook of Federal Indian Law §7.05[1][b], p. 643 (2012). Since then, Congress has continued to exercise its plenary authority over tribal immunity, specifically preserving immunity in some contexts and abrogating it in others, but never adopting the change Michigan wants. So rather than confronting, as we did in Kiowa, a legislative vacuum as to the precise issue presented, we act today against the backdrop of a congressional choice: to retain tribal immunity (at least for now) in a case like this one.

---

11 Compare, e.g., Prevent All Cigarette Trafficking Act of 2009, §§2(e), (3)(a), 124 Stat. 1101, 1108 (preserving immunity), with Arizona Water Settlements Act, §§213(a)(2), 301, 118 Stat. 3531, 3551 (abrogating immunity). The dissent’s claim that “Congress has never granted tribal sovereign immunity in any shape or form,” post, at 13, apparently does not take into account the many statutes in which Congress preserved or otherwise ratified tribal immunity. See, e.g., 25 U. S. C. §450n; see generally Potawatomi, 498 U. S., at 510 (“Congress has consistently reiterated its approval of the immunity doctrine”).

12 The dissent principally counters that this history is not “relevant” because Kiowa was a “common-law decision.” Post, at 14. But that is
Opinion of the Court

Reversing Kiowa in these circumstances would scale the heights of presumption: Beyond upending “long-established principle[s] of tribal sovereign immunity,” that action would replace Congress’s considered judgment with our contrary opinion. Potawatomi, 498 U. S., at 510. As Kiowa recognized, a fundamental commitment of Indian law is judicial respect for Congress’s primary role in defining the contours of tribal sovereignty. See 523 U. S., at 758–760; see also Santa Clara Pueblo, 436 U. S., at 60 (“[A] proper respect . . . for the plenary authority of Congress in this area cautions that [the courts] tread lightly”); Cohen, supra, §2.01[1], at 110 (“Judicial deference to the paramount authority of Congress in matters concerning Indian policy remains a central and indispensable principle of the field of Indian law”). That commitment gains only added force when Congress has already reflected on an issue of tribal sovereignty, including immunity from suit, and declined to change settled law. And that force must grow greater still when Congress considered that issue partly at our urging. See Kiowa, 523 U. S., at 758 (hinting, none too subtly, that “Congress may wish to exercise” its authority over the question presented). Having held in Kiowa that this issue is up to Congress, we cannot reverse ourselves because some may think its conclusion wrong. Congress of course may always change its mind—and we would readily defer to that new decision. But it is for Congress, now more than ever, to say whether to create an exception to tribal immunity for off-reservation commercial activity. As in Kiowa—except still to ignore what Kiowa (in line with prior rulings) specifically told Congress: that tribal immunity, far from any old common law doctrine, lies in Congress’s hands to configure. See 523 U. S., at 758; Potawatomi, 498 U. S., at 510; Santa Clara Pueblo v. Martinez, 436 U. S. 49, 58–60 (1978). When we inform Congress that it has primary responsibility over a sphere of law, and invite Congress to consider a specific issue within that sphere, we cannot deem irrelevant how Congress responds.
more so—“we decline to revisit our case law[,] and choose” instead “to defer to Congress.” *Id.*, at 760.

V

As “domestic dependent nations,” Indian tribes exercise sovereignty subject to the will of the Federal Government. *Cherokee Nation*, 5 Pet., at 17. Sovereignty implies immunity from lawsuits. Subjection means (among much else) that Congress can abrogate that immunity as and to the extent it wishes. If Congress had authorized this suit, Bay Mills would have no valid grounds to object. But Congress has not done so: The abrogation of immunity in IGRA applies to gaming on, but not off, Indian lands. We will not rewrite Congress’s handiwork. Nor will we create a freestanding exception to tribal immunity for all off-reservation commercial conduct. This Court has declined that course once before. To choose it now would entail both overthrowing our precedent and usurping Congress’s current policy judgment. Accordingly, Michigan may not sue Bay Mills to enjoin the Vanderbilt casino, but must instead use available alternative means to accomplish that object.

We affirm the Sixth Circuit’s judgment and remand the case for further proceedings consistent with this opinion.

*It is so ordered.*
SOTOMAYOR, J., concurring.

SUPREME COURT OF THE UNITED STATES

No. 12–515

MICHIGAN, PETITIONER v. BAY MILLS INDIAN COMMUNITY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[May 27, 2014]

JUSTICE SOTOMAYOR, concurring.

The doctrine of tribal immunity has been a part of American jurisprudence for well over a century. See, e.g., Parks v. Ross, 11 How. 362 (1851); Struve, Tribal Immunity and Tribal Courts, 36 Ariz. St. L. J. 137, 148–155 (2004) (tracing the origins of the doctrine to the mid-19th century); Wood, It Wasn’t An Accident: The Tribal Sovereign Immunity Story, 62 Am. U. L. Rev. 1587, 1640–1641 (2013) (same). And in more recent decades, this Court has consistently affirmed the doctrine. See, e.g., United States v. United States Fidelity & Guaranty Co., 309 U. S. 506 (1940); Puyallup Tribe, Inc. v. Department of Game of Wash., 433 U. S. 165 (1977); C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U. S. 411, 418 (2001). Despite this history, the principal dissent chides the Court for failing to offer a sufficient basis for the doctrine of tribal immunity, post, at 3 (opinion of THOMAS, J.), and reasons that we should at least limit the doctrine of tribal sovereign immunity in ways that resemble restrictions on foreign sovereign immunity.

The majority compellingly explains why stare decisis and deference to Congress’ careful regulatory scheme require affirming the decision below. I write separately to further detail why both history and comity counsel against limiting Tribes’ sovereign immunity in the manner the
SOTOMAYOR, J., concurring

principal dissent advances.

I

Long before the formation of the United States, Tribes “were self-governing sovereign political communities.” *United States v. Wheeler*, 435 U. S. 313, 322–323 (1978). And Tribes “have not given up their full sovereignty.” *Id.*, at 323. Absent contrary congressional acts, Tribes “retain their existing sovereign powers” and “possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.” *Ibid.* See also 25 U. S. C. §1301(1) (affirming Tribes’ continued “powers of self-government”). In this case then, the question is what type of immunity federal courts should accord to Tribes, commensurate with their retained sovereignty.

In answering this question, the principal dissent analogizes tribal sovereign immunity to foreign sovereign immunity. Foreign sovereigns (unlike States) are generally not immune from suits arising from their commercial activities. *Post*, at 4; see also Foreign Sovereign Immunities Act of 1976, 28 U. S. C. §1605(a)(2) (commercial-activity exception to foreign sovereign immunity). This analogy, however, lacks force. Indian Tribes have never historically been classified as “foreign” governments in federal courts even when they asked to be.

The case of *Cherokee Nation v. Georgia*, 5 Pet. 1 (1831), is instructive. In 1828 and 1829, the Georgia Legislature enacted a series of laws that purported to nullify acts of the Cherokee government and seize Cherokee land, among other things. *Id.*, at 7–8. The Cherokee Nation sued Georgia in this Court, alleging that Georgia’s laws violated federal law and treaties. *Id.*, at 7. As the constitutional basis for jurisdiction, the Tribe relied on Article III, §2, cl. 1, which extends the federal judicial power to cases “between a state, or the citizens thereof, and foreign states,
SOTOMAYOR, J., concurring

citizens, or subjects.”  5 Pet., at 15 (internal quotation marks omitted). But this Court concluded that it lacked jurisdiction because Tribes were not “foreign state[s].”  Id., at 20. The Court reasoned that “[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence.”  Id., at 16. Tribes were more akin to “domestic dependent nations,” the Court explained, than to foreign nations.  Id., at 17. We have repeatedly relied on that characterization in subsequent cases. See, e.g., Oklahoma Tax Comm’n v. Citizen Band Potawatomi Tribe of Okla., 498 U. S. 505, 509 (1991); Merrion v. Jicarilla Apache Tribe, 455 U. S. 130, 141 (1982). Two centuries of jurisprudence therefore weigh against treating Tribes like foreign visitors in American courts.

II

The principal dissent contends that whenever one sovereign is sued in the courts of another, the question whether to confer sovereign immunity is not a matter of right but rather one of “comity.”  Post, at 3. But in my view, the premise leads to a different conclusion than the one offered by the dissent. Principles of comity strongly counsel in favor of continued recognition of tribal sovereign immunity, including for off-reservation commercial conduct.

Comity—“that is, ‘a proper respect for [a sovereign’s] functions,’” Sprint Communications, Inc. v. Jacobs, 571 U. S. ___, ___ (2013) (slip op., at 7)—fosters “respectful, harmonious relations” between governments, Wood v. Milyard, 566 U. S. ___, ___ (2012) (slip op., at 7). For two reasons, these goals are best served by recognizing sovereign immunity for Indian Tribes, including immunity for off-reservation conduct, except where Congress has expressly abrogated it. First, a legal rule that permitted States to sue Tribes, absent their consent, for commercial
conduct would be anomalous in light of the existing prohibitions against Tribes’ suing States in like circumstances. Such disparate treatment of these two classes of domestic sovereigns would hardly signal the Federal Government’s respect for tribal sovereignty. Second, Tribes face a number of barriers to raising revenue in traditional ways. If Tribes are ever to become more self-sufficient, and fund a more substantial portion of their own governmental functions, commercial enterprises will likely be a central means of achieving that goal.

A

We have held that Tribes may not sue States in federal court, Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991), including for commercial conduct that chiefly impacts Indian reservations, Seminole Tribe of Fla. v. Florida, 517 U. S. 44 (1996). In Seminole Tribe, the Tribe sued the State of Florida in federal court under the Indian Gaming Regulatory Act (IGRA)—the same statute petitioner relies on here. The suit alleged that Florida had breached its statutory “duty to negotiate in good faith with [the Tribe] toward the formation of a [gaming] compact.” Id., at 47. This Court held that state sovereign immunity prohibited such a suit.

Importantly, the Court barred the Tribe’s suit against Florida even though the case involved the State’s conduct in the course of commercial negotiations. As this Court later observed, relying in part on Seminole Tribe, the doctrine of state sovereign immunity is not “any less robust” when the case involves conduct “that is undertaken for profit, that is traditionally performed by private citizens and corporations, and that otherwise resembles the behavior of ‘market participants.’” College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 527 U. S. 666, 684 (1999). Nor did Seminole Tribe adopt a state corollary to the “off-reservation” exception to tribal
sovereign immunity that the principal dissent urges today.
To the contrary, the negotiations in Seminole Tribe concerned gaming on Indian lands, not state lands.

As the principal dissent observes, “comity is about one sovereign respecting the dignity of another.” Post, at 4. This Court would hardly foster respect for the dignity of Tribes by allowing States to sue Tribes for commercial activity on State lands, while prohibiting Tribes from suing States for commercial activity on Indian lands. Both States and Tribes are domestic governments who come to this Court with sovereignty that they have not entirely ceded to the Federal Government.

Similar asymmetry would result if States could sue Tribes in state courts. In Nevada v. Hicks, 533 U. S. 353, 355 (2001), this Court considered whether a tribal court had “jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation.” It held that the tribal court did not. Id., at 374. In reaching that conclusion, the Court observed that “[s]tate sovereignty does not end at a reservation’s border.” Id., at 361. And relying on similar principles, some federal courts have more explicitly held that tribal courts may not entertain suits against States. See, e.g., Montana v. Gilham, 133 F. 3d 1133, 1136–1137 (CA9 1998) (holding that while neither “the Eleventh Amendment [n]or congressional act” barred suits against States in tribal courts, “the inherent sovereign powers of the States” barred such suits). To the extent Tribes are barred from suing in tribal courts, it would be anomalous to permit suits against Tribes in state courts.

Two of the dissenting opinions implicitly address this

---

1 While this case involves a suit against a Tribe in federal court, the principal dissent also critiques tribal sovereign immunity in state courts. Post, at 4–5.
asymmetry. The principal dissent reasons that States and Tribes should be treated differently for purposes of sovereign immunity because—unlike tribal sovereign immunity—state sovereign immunity has constitutional origins. Post, at 3, n. 1. JUSTICE GINSBURG offers another view: that Tribes and States should both receive less immunity. She expresses concerns about cases like Seminole Tribe, pointing to dissents that have catalogued the many problems associated with the Court’s sprawling state sovereign immunity jurisprudence. Post, at 1–2 (citing, among others, Alden v. Maine, 527 U. S. 706, 814 (1999) (Souter, J., dissenting)).

As things stand, however, Seminole Tribe and its progeny remain the law. And so long as that is so, comity would be ill-served by unequal treatment of States and Tribes. If Tribes cannot sue States for commercial activities on tribal lands, the converse should also be true. Any other result would fail to respect the dignity of Indian Tribes.

B

The principal dissent contends that Tribes have emerged as particularly “substantial and successful” commercial actors. Post, at 13. The dissent expresses concern that, although tribal leaders can be sued for prospective relief, ante, at 13 (majority opinion), Tribes’ purportedly growing coffers remain unexposed to broad damages liability. Post, at 10–11. These observations suffer from two flaws.

First, not all Tribes are engaged in highly lucrative commercial activity. Nearly half of federally recognized Tribes in the United States do not operate gaming facilities at all. A. Meister, Casino City’s Indian Gaming Industry Report 28 (2009–2010 ed.) (noting that “only 237, or 42 percent, of the 564 federally recognized Native
American tribes in the U. S. operate gaming”). And even among the Tribes that do, gaming revenue is far from uniform. As of 2009, fewer than 20% of Indian gaming facilities accounted for roughly 70% of the revenues from such facilities. Ibid. One must therefore temper any impression that Tribes across the country have suddenly and uniformly found their treasuries filled with gaming revenue.

Second, even if all Tribes were equally successful in generating commercial revenues, that would not justify the commercial-activity exception urged by the principal dissent. For tribal gaming operations cannot be understood as mere profit-making ventures that are wholly separate from the Tribes’ core governmental functions. A key goal of the Federal Government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on federal funding. 25 U. S. C. §2702(1) (explaining that Congress’ purpose in enacting IGRA was “to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments”); see also Cohen’s Handbook of Federal Indian Law 1357–1373 (2012) (Cohen’s Handbook) (describing various types of federal financial assistance that Tribes receive). And tribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases “may be the only means by which a tribe can raise revenues,” Struve, 36 Ariz. St. L. J., at 169. This is due in large part to the insuperable (and often state-imposed) barriers Tribes face in raising revenue through more

2The term “‘Indian gaming facility’ is defined as any tribal enterprise that offer[s] gaming in accordance with [the Indian Gaming Regulation Act].” A. Meister, Casino City’s Indian Gaming Industry Report 10 (2009–2010 ed.).
For example, States have the power to tax certain individuals and companies based on Indian reservations, making it difficult for Tribes to raise revenue from those sources. See *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U. S. 505 (allowing State to collect taxes on sales to non-Indians on Indian land); *Arizona Dept. of Revenue v. Blaze Constr. Co.*, 526 U. S. 32 (1999) (allowing taxation of companies owned by non-Indians on Indian land); *Thomas v. Gay*, 169 U. S. 264 (1898) (allowing taxation of property owned by non-Indians on Indian land). States may also tax reservation land that Congress has authorized individuals to hold in fee, regardless of whether it is held by Indians or non-Indians. See *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U. S. 103 (1998) (States may tax Indian reservation land if Congress made the land subject to sale under the Indian General Allotment Act of 1887 (also known as the Dawes Act)); *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251 (1992) (same).

As commentators have observed, if Tribes were to impose their own taxes on these same sources, the resulting double taxation would discourage economic growth. Fletcher, In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue, 80 N. D. L. Rev. 759, 771 (2004); see also Cowan, Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal Government in Protecting Tribal Governmental Revenues, 2 Pittsburgh Tax Rev. 93, 95 (2005); Enterprise Zones, Hearings before the Subcommittee on Select Revenue Measures of the House Committee On Ways and Means, 102d Cong., 1st Sess., 234 (1991) (statement of Peterson Zah, President of the Navajo Nation) ("[D]ouble taxation interferes with our ability to encourage economic activity and to develop effective reve-
SOTOMAYOR, J., concurring

...generating tax programs. Many businesses may find it easier to avoid doing business on our reservations rather than . . . bear the brunt of an added tax burden").

If non-Indians controlled only a small amount of property on Indian reservations, and if only a negligible amount of land was held in fee, the double-taxation concern might be less severe. But for many Tribes, that is not the case. History explains why this is so: Federal policies enacted in the late 19th and early 20th centuries rendered a devastating blow to tribal ownership. In 1887, Congress enacted the Dawes Act. 24 Stat. 388. That Act had two major components relevant here. First, it converted the property that belonged to Indian Tribes into fee property, and allotted the land to individual Indians. Id., at 388–389. Much of this land passed quickly to non-Indian owners. Royster, The Legacy of Allotment, 27 Ariz. St. L. J. 1, 12 (1995). Indeed, by 1934, the amount of land that passed from Indian Tribes to non-Indians totaled 90 million acres. See Cohen’s Handbook 74. Other property passed to non-Indians when destitute Indians found themselves unable to pay state taxes, resulting in sheriff’s sales. Royster, supra, at 12.

A second component of the Dawes Act opened “surplus” land on Indian reservations to settlement by non-Indians. 24 Stat. 389–390. Selling surplus lands to non-Indians was part of a more general policy of forced assimilation. See Cohen’s Handbook 75. Sixty million acres of land passed to non-Indian hands as a result of surplus programs. Royster, supra, at 13.3

These policies have left a devastating legacy, as the cases that have come before this Court demonstrate. We

3This figure does not include land taken from Indian Tribes after World War II; during that time, some Tribes and reservations were liquidated and given to non-Indians. A. Debo, A History of Indians of the United States 301–312 (1970).
noted in *Montana v. United States*, 450 U. S. 544, 548 (1981), for example, that due in large part to the Dawes Act, 28% of the Crow Tribe’s reservation in Montana was held in fee by non-Indians. Similarly, Justice White observed in *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U. S. 408, 414 (1989) (plurality opinion), that 20% of the Yakima Nation’s reservation was owned in fee. For reservations like those, it is particularly impactful that States and local governments may tax property held by non-Indians, *Thomas*, 169 U. S., at 264–265, and land held in fee as a result of the Dawes Act. See *County of Yakima*, 502 U. S., at 259.

Moreover, Tribes are largely unable to obtain substantial revenue by taxing tribal members who reside on non-fee land that was not allotted under the Dawes Act. As one scholar recently observed, even if Tribes imposed high taxes on Indian residents, “there is very little income, property, or sales they could tax.” Fletcher, *supra*, at 774. The poverty and unemployment rates on Indian reservations are significantly greater than the national average. See n. 4, *infra*. As a result, “there is no stable tax base on most reservations.” Fletcher, *supra*, at 774; see Williams, Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Governmental Tax Status Act of 1982, 22 Harv. J. Legis. 335, 385 (1985).

To be sure, poverty has decreased over the past few decades on reservations that have gaming activity. One recent study found that between 1990 and 2000, the presence of a tribal casino increased average per capita income by 7.4% and reduced the family poverty rate by 4.9 percentage points. Anderson, Tribal Casino Impacts on American Indians Well-Being: Evidence From Reservation-Level Census Data, 31 Contemporary Economic Policy 291, 298 (Apr. 2013). But even reservations that have gaming continue to experience significant poverty, especially relative to the national average. See *id.*, at 296.
SOTOMAYOR, J., concurring

The same is true of Indian reservations more generally.4

*   *   *

Both history and proper respect for tribal sovereignty—or comity—counsel against creating a special “commercial activity” exception to tribal sovereign immunity. For these reasons, and for the important reasons of *stare decisis* and deference to Congress outlined in the majority opinion, I concur.

---

SCALIA, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 12–515

MICHIGAN, PETITIONER v. BAY MILLS INDIAN COMMUNITY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[May 27, 2014]

JUSTICE SCALIA, dissenting.

In Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc., 523 U. S. 751 (1998), this Court expanded the judge-invented doctrine of tribal immunity to cover off-reservation commercial activities. *Id.*, at 760. I concurred in that decision. For the reasons given today in JUSTICE THOMAS’s dissenting opinion, which I join, I am now convinced that *Kiowa* was wrongly decided; that, in the intervening 16 years, its error has grown more glaringly obvious; and that *stare decisis* does not recommend its retention. Rather than insist that Congress clean up a mess that I helped make, I would overrule *Kiowa* and reverse the judgment below.
THOMAS, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 12–515

MICHIGAN, PETITIONER v. BAY MILLS INDIAN COMMUNITY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[May 27, 2014]

JUSTICE THOMAS, with whom JUSTICE SCALIA, JUSTICE GINSBURG, and JUSTICE ALITO join, dissenting.

In Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc., 523 U. S. 751 (1998), this Court extended the judge-made doctrine of tribal sovereign immunity to bar suits arising out of an Indian tribe’s commercial activities conducted outside its territory. That was error. Such an expansion of tribal immunity is unsupported by any rationale for that doctrine, inconsistent with the limits on tribal sovereignty, and an affront to state sovereignty.

That decision, wrong to begin with, has only worsened with the passage of time. In the 16 years since Kiowa, tribal commerce has proliferated and the inequities engendered by unwarranted tribal immunity have multiplied. Nevertheless, the Court turns down a chance to rectify its error. Still lacking a substantive justification for Kiowa’s rule, the majority relies on notions of deference to Congress and stare decisis. Because those considerations do not support (and cannot sustain) Kiowa’s unjustifiable rule and its mounting consequences, I respectfully dissent.

I

A

There is no substantive basis for Kiowa’s extension of
tribal immunity to off-reservation commercial acts. As this Court explained in *Kiowa*, the common-law doctrine of tribal sovereign immunity arose “almost by accident.” *Id.*, at 756. The case this Court typically cited as the doctrine’s source “simply does not stand for that proposition,” *ibid.* (citing *Turner v. United States*, 248 U. S. 354 (1919)), and later cases merely “reiterated the doctrine” “with little analysis,” 523 U. S., at 757. In fact, far from defending the doctrine of tribal sovereign immunity, the *Kiowa* majority “doubt[ed] the wisdom of perpetuating the doctrine.” *Id.*, at 758. The majority here suggests just one post hoc justification: that tribes automatically receive immunity as an incident to their historic sovereignty. But that explanation fails to account for the fact that immunity does not apply of its own force in the courts of another sovereign. And none of the other colorable rationales for the doctrine—*i.e.*, considerations of comity, and protection of tribal self-sufficiency and self-government—supports extending immunity to suits arising out of a tribe’s commercial activities conducted beyond its territory.

1

Despite the Indian tribes’ subjection to the authority and protection of the United States Government, this Court has deemed them “domestic dependent nations” that retain limited attributes of their historic sovereignty. *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831); see also *United States v. Wheeler*, 435 U. S. 313, 323 (1978) (“The sovereignty that the Indian tribes retain is of a unique and limited character”). The majority suggests that tribal immunity is one such attribute of sovereignty that tribes have retained. See *ante*, at 5; Brief for Respondent Bay Mills Indian Community 48; On that view, immunity from suit applies automatically, on the theory that it is simply “inherent in the nature of sovereignty,” *The Federalist* No. 81, p. 548 (J. Cooke ed. 1961).
THOMAS, J., dissenting

This basis for immunity—the only substantive basis the majority invokes—is unobjectionable when a tribe raises immunity as a defense in its own courts. We have long recognized that in the sovereign’s own courts, “the sovereign’s power to determine the jurisdiction of its own courts and to define the substantive legal rights of its citizens adequately explains the lesser authority to define its own immunity.” *Kiowa*, supra, at 760 (Stevens, J., dissenting) (citing *Kawananaokoa v. Polyblank*, 205 U. S. 349, 353 (1907)). But this notion cannot support a tribe’s claim of immunity in the courts of another sovereign—either a State (as in *Kiowa*) or the United States (as here). Sovereign immunity is not a freestanding “right” that applies of its own force when a sovereign faces suit in the courts of another. *Republic of Austria v. Altmann*, 541 U. S. 677, 688 (2004). Rather, “[t]he sovereign’s claim to immunity in the courts of a second sovereign . . . normally depends on the second sovereign’s law.” *Kiowa*, supra, at 760–761 (Stevens, J., dissenting); see, e.g., *Altmann*, supra, at 711 (BREYER, J., concurring) (application of foreign sovereign immunity “is a matter, not of legal right, but of ‘grace and comity’”).

In short, to the extent an Indian tribe may claim immunity in federal or state court, it is because federal or state law provides it, not merely because the tribe is sovereign. Outside of tribal courts, the majority’s

---

1 State sovereign immunity is an exception: This Court has said that the States’ immunity from suit in federal court is secured by the Constitution. *See Kimel v. Florida Bd. of Regents*, 528 U. S. 62, 73 (2000) (“[F]or over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States”); *Alden v. Maine*, 527 U. S. 706, 733 (1999) (“Although the sovereign immunity of the States derives at least in part from the common-law tradition, . . . the immunity exists today by constitutional design”). Unlike the States, Indian tribes “are not part of this constitutional order,” and their immunity is not guaranteed by it. *United States v. Lara*, 541 U. S. 193, 219 (2004) (THOMAS, J., concurring in judgment).
inherent-immunity argument is hardly persuasive.

2

Immunity for independent foreign nations in federal courts is grounded in international “comity,” *Verlinden B. V. v. Central Bank of Nigeria*, 461 U. S. 480, 486 (1983), *i.e.*, respecting the dignity of other sovereigns so as not to “‘imperil the amicable relations between governments and vex the peace of nations,’” *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398, 418 (1964). But whatever its relevance to tribal immunity, comity is an ill-fitting justification for extending immunity to tribes’ off-reservation commercial activities. Even with respect to fully sovereign foreign nations, comity has long been discarded as a sufficient reason to grant immunity for commercial acts. In 1976, Congress provided that foreign states are not immune from suits based on their “commercial activity” in the United States or abroad. *Foreign Sovereign Immunities Act*, 28 U. S. C. §1605(a)(2); see also *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U. S. 682, 703–704 (1976) (plurality opinion of White, J., joined by Burger, C. J., and Powell and Rehnquist, JJ.) (“Subjecting foreign governments to the rule of law in their commercial dealings” is “unlikely to touch very sharply on ‘national nerves,’” because “[i]n their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns”).

There is a further reason that comity cannot support tribal immunity for off-reservation commercial activities. At bottom, comity is about one sovereign respecting the dignity of another. See *Nevada v. Hall*, 440 U. S. 410, 416 (1979). But permitting immunity for a tribe’s off-reservation acts represents a substantial affront to a different set of sovereigns—the States, whose sovereignty is guaranteed by the Constitution, see *New York v. United States*, 505 U. S. 144, 188 (1992) (“The Constitution . . .
leaves to the several States a residuary and inviolable sovereignty’” (quoting The Federalist No. 39, at 256)). When an Indian tribe engages in commercial activity outside its own territory, it necessarily acts within the territory of a sovereign State. This is why, “absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.” *Mescalero Apache Tribe v. Jones*, 411 U. S. 145, 148–149 (1973). A rule barring all suits against a tribe arising out of a tribe’s conduct within state territory—whether private actions or (as here) actions brought by the State itself—stands in stark contrast to a State’s broad regulatory authority over Indians within its own territory. Indeed, by foreclosing key mechanisms upon which States depend to enforce their laws against tribes engaged in off-reservation commercial activity, such a rule effects a breathtaking pre-emption of state power. *Kiowa*, 523 U. S., at 764 (Stevens, J., dissenting). What is worse, because that rule of immunity also applies in state courts, it strips the States of their prerogative “to decide for themselves whether to accord such immunity to Indian tribes as a matter of comity.” *Id.*, at 760 (same). The States may decide whether to grant immunity in their courts to other sovereign States, see *Hall*, supra, at 417–418 (a State’s immunity from suit in the courts of a second State depends on whether the second has chosen to extend immunity to the first “as a matter of comity”), but when it comes to Indian tribes, this Court has taken that right away. *Kiowa*, supra, at 765 (Stevens, J., dissenting).

Nor does granting tribes immunity with respect to their commercial conduct in state territory serve the practical aim of comity: allaying friction between sovereigns. See *Banco Nacional de Cuba*, supra, at 417–418. We need look no further than this case (and many others cited by petitioner and amici States) to see that such broad immunity
Thomas, J., dissenting

has only aggravated relationships between States and tribes throughout the country. See infra, at 11–13; see generally Brief for State of Alabama et al. 11–16; Brief for State of Oklahoma 8–10, 12–15.

3

This Court has previously suggested that recognizing tribal immunity furthers a perceived congressional goal of promoting tribal self-sufficiency and self-governance. See Kiowa, supra, at 757; Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C., 476 U.S. 877, 890 (1986). Whatever the force of this assertion as a general matter, it is easy to reject as a basis for extending tribal immunity to off-reservation commercial activities. In Kiowa itself, this Court dismissed the self-sufficiency rationale as “inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities.” 523 U.S., at 757–758. The Court expressed concern that “[i]n this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.” Id., at 758.

Nor is immunity for off-reservation commercial acts necessary to protect tribal self-governance. As the Kiowa majority conceded, “[i]n our interdependent and mobile society, . . . tribal immunity extends beyond what is needed to safeguard tribal self-governance.” Ibid. Such broad immunity far exceeds the modest scope of tribal sovereignty, which is limited only to “what is necessary to protect tribal self-government or to control internal relations.” Montana v. United States, 450 U.S. 544, 564 (1981); see also Nevada v. Hicks, 533 U.S. 353, 392 (2001) (O'Connor, J., concurring in part and concurring in judgment) (“[T]ribes retain sovereign interests in activities that occur on land owned and controlled by the tribe . . .”). And no
party has suggested that immunity from the isolated suits that may arise out of extraterritorial commercial dealings is somehow fundamental to protecting tribal government or regulating a tribe’s internal affairs.

B

Despite acknowledging that there is scant substantive justification for extending tribal immunity to off-reservation commercial acts, this Court did just that in \textit{Kiowa}. See 523 U. S., at 758. The \textit{Kiowa} majority admitted that the Court—rather than Congress—“has taken the lead in drawing the bounds of tribal immunity.” \textit{Id.}, at 759. Nevertheless, the Court adopted a rule of expansive immunity purportedly to “defer to the role Congress may wish to exercise in this important judgment.” \textit{Id.}, at 758.

This asserted “deference” to Congress was a fiction and remains an enigma, however, because the \textit{Kiowa} Court did not actually leave to Congress the decision whether to extend tribal immunity. Tribal immunity is a common-law doctrine adopted and shaped by this Court. \textit{Oklahoma Tax Comm’n v. Citizen Band Potawatomi Tribe of Okla.}, 498 U. S. 505, 510 (1991); \textit{Kiowa}, 523 U. S., at 759. Before \textit{Kiowa}, we had never held that tribal sovereign immunity applied to off-reservation commercial activities.\textsuperscript{2} Thus, faced with an unresolved question about a common-law doctrine of its own design, the \textit{Kiowa} Court had to

\textsuperscript{2}The Court in \textit{Kiowa} noted that in one case, we upheld a claim of immunity where “a state court had asserted jurisdiction over tribal fishing ‘both on and off its reservation.’” 523 U. S., at 754 (quoting \textit{Puyallup Tribe, Inc. v. Department of Game of Wash.}, 433 U. S. 165, 167 (1977)). It went on to admit, however, that \textit{Puyallup} “did not discuss the relevance of where the fishing had taken place.” 523 U. S., at 754. And, as Justice Stevens explained in dissent, that case was about whether the state courts had jurisdiction to regulate fishing activities on the reservation; “we had no occasion to consider the validity of an injunction relating solely to off-reservation fishing.” \textit{Id.}, at 763.
make a choice: tailor the immunity to the realities of their commercial enterprises, or “grant . . . virtually unlimited tribal immunity.” *Id.* at 764 (Stevens, J., dissenting). The Court took the latter course. In doing so, it did not “defe[r] to Congress or exercis[e] ’caution’—rather, it . . . creat[ed] law.” *Id.*, at 765 (citation omitted). To be sure, Congress had the power to “alter” that decision if it wanted. *Id.*, at 759 (majority opinion). But Congress has the authority to do that with respect to any nonconstitutional decision involving federal law, and the mere existence of this authority could not be the basis for choosing one outcome over another in *Kiowa*.3

Accident or no, it was this Court, not Congress, that adopted the doctrine of tribal sovereign immunity in the first instance. And it was this Court that left open a question about its scope. Why should Congress—and only Congress, according to the *Kiowa* Court—have to take on a problem this Court created? In other areas of federal common law, until Congress intervenes, it is up to us to correct our errors. See, *e.g.*, *Exxon Shipping Co. v. Baker*, 554 U. S. 471, 507 (2008) (“[I]f, in the absence of legislation, judicially derived standards leave the door open to outlier punitive-damages awards [in maritime law], it is hard to see how the judiciary can wash its hands of a

---

3 Nor did the *Kiowa* Court “defer” to any pre-existing congressional policy choices. As I have already made clear, the rule the Court chose in *Kiowa* was divorced from, and in some ways contrary to any federal interest. See Part I–A, supra; see also *Kiowa*, 523 U. S., at 765 (Stevens, J., dissenting). And the rule is a “strikingly anomalous” departure from the immunities of other sovereigns in federal and state court. *Ibid.* (observing that *Kiowa* conferred on Indian tribes “broader immunity than the States, the Federal Government, and foreign nations”); see also Florey, *Indian Country’s Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, 51 Boston College L. Rev. 595, 627 (2010) (After *Kiowa*, “the actual contours of [tribal immunity] remain astonishingly broad”).
THOMAS, J., dissenting

problem it created, simply by calling quantified standards legislative’); National Metropolitan Bank v. United States, 323 U. S. 454, 456 (1945) (“[I]n the absence of an applicable Act of Congress, federal courts must fashion the governing rules” in commercial-paper cases affecting the rights and liabilities of the United States). We have the same duty here.

II

Today, the Court reaffirms Kiowa. Unsurprisingly, it offers no new substantive defense for Kiowa’s indefensible view of tribal immunity. Instead, the majority relies on a combination of the Kiowa Court’s purported deference to Congress and considerations of stare decisis. I have already explained why it was error to ground the Kiowa rule in deference to Congress. I turn now to stare decisis. Contrary to the majority’s claim, that policy does not require us to preserve this Court’s mistake in Kiowa. The Court’s failure to justify Kiowa’s rule and the decision’s untoward consequences outweigh the majority’s arguments for perpetuating the error.

A

Stare decisis may sometimes be “the preferred course,” but as this Court acknowledges, it is “not an inexorable command.” Payne v. Tennessee, 501 U. S. 808, 827, 828 (1991). “[W]hen governing decisions are unworkable or are badly reasoned,” id., at 827, or “experience has pointed up the precedent’s shortcomings,” Pearson v. Callahan, 555 U. S. 223, 233 (2009), “this Court has never felt constrained to follow precedent,’ “ Payne, supra, at 827. See also Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U. S. 271, 282–283 (1988) (overruling precedent as “deficient in utility and sense,” “unsound in theory, unworkable and arbitrary in practice, and unnecessary to achieve any legitimate goals”). The discussion above explains why
Kiowa was unpersuasive on its own terms. Now, the adverse consequences of that decision make it even more untenable.

In the 16 years since Kiowa, the commercial activities of tribes have increased dramatically. This is especially evident within the tribal gambling industry. Combined tribal gaming revenues in 28 States have more than tripled—from $8.5 billion in 1998 to $27.9 billion in 2012. National Indian Gaming Commission, 2012 Indian Gaming Revenues Increase 2.7 Percent (July 23, 2013), online at http://www.nigc.gov/LinkClick.aspx?fileticket=Fhd5shyZ1fM%3D (all Internet materials as visited May 2, 2014, and available in Clerk of Court’s case file). But tribal businesses extend well beyond gambling and far past reservation borders. In addition to ventures that take advantage of on-reservation resources (like tourism, recreation, mining, forestry, and agriculture), tribes engage in “domestic and international business ventures” including manufacturing, retail, banking, construction, energy, telecommunications, and more. Graham, An Interdisciplinary Approach to American Indian Economic Development, 80 N. D. L. Rev. 597, 600–604 (2004). Tribal enterprises run the gamut: they sell cigarettes and prescription drugs online; engage in foreign financing; and operate greeting cards companies, national banks, cement plants, ski resorts, and hotels. Ibid.; see also, e.g., The Harvard Project on American Indian Economic Development, The State of the Native Nations 124 (2008) (Ho-Chunk, Inc., a tribal corporation of the Winnebago Tribe of Nebraska, operates “hotels in Nebraska and Iowa,” “numerous retail grocery and convenience stores,” a “tobacco and gasoline distribution company,” and “a temporary labor service provider”); Four Fires, San Manuel Band of Mission Indians, http://www.sanmanuel-nsn.gov/fourfires.php.html (four Tribes from California and Wisconsin jointly own and operate a $43 million hotel in Washington, D. C.). These manifold com-
commercial enterprises look the same as any other—except immunity renders the tribes largely litigation-proof.

As the commercial activity of tribes has proliferated, the conflict and inequities brought on by blanket tribal immunity have also increased. Tribal immunity significantly limits, and often extinguishes, the States’ ability to protect their citizens and enforce the law against tribal businesses. This case is but one example: No one can seriously dispute that Bay Mills’ operation of a casino outside its reservation (and thus within Michigan territory) would violate both state law and the Tribe’s compact with Michigan. Yet, immunity poses a substantial impediment to Michigan’s efforts to halt the casino’s operation permanently. The problem repeats itself every time a tribe fails to pay state taxes, harms a tort victim, breaches a contract, or otherwise violates state laws, and tribal immunity bars the only feasible legal remedy. Given the wide reach of tribal immunity, such scenarios are commonplace.4 See, e.g., Oneida Indian Nation of New York v. Madison Cty., 605 F. 3d 149, 163 (CA2 2010) (Cabranes, J., joined by Hall, J., concurring) (“The holding in this case comes down to this: an Indian tribe can purchase land (including land that was never part of a reservation); refuse

---

4 Lower courts have held that tribal immunity shields not only Indian tribes themselves, but also entities deemed “arms of the tribe.” See, e.g., Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort, 629 F. 3d 1173, 1191–1195 (CA10 2010) (casino and economic development authority were arms of the Tribe); Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc., 585 F. 3d 917, 921 (CA6 2009) (tribal conglomerate was an arm of the Tribe). In addition, tribal immunity has been interpreted to cover tribal employees and officials acting within the scope of their employment. See, e.g., Cook v. AVI Casino Enterprises, Inc., 548 F. 3d 718, 726–727 (CA9 2008); Native American Distributing v. Seneca-Cayuga Tobacco Co., 546 F. 3d 1288, 1296 (CA10 2008); Chayoon v. Chao, 355 F. 3d 141, 143 (CA2 2004) (per curiam); Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla., 177 F. 3d 1212, 1225–1226 (CA11 1999).
to pay lawfully-owed taxes; and suffer no consequences because the taxing authority cannot sue to collect the taxes owed"); see also Furry v. Miccosukee Tribe of Indians of Fla., 685 F. 3d 1224 (CA11 2012) (Tribe immune from a suit arising out of a fatal off-reservation car crash that alleged negligence and violation of state dram shop laws); Native American Distributing v. Seneca-Cayuga Tobacco Co., 546 F. 3d 1288 (CA10 2008) (tribal officials and a tobacco-products manufacturer were immune from a suit brought by a national distributor alleging breach of contract and interstate market manipulation); Tonasket v. Sargent, 830 F. Supp. 2d 1078 (ED Wash. 2011) (tribal immunity foreclosed an action against the Tribe for illegal price fixing, antitrust violations, and unfair competition), aff’d, 510 Fed. Appx. 648 (CA9 2013); Multimedia Games, Inc. v. WLGC Acquisition Corp., 214 F. Supp. 2d 1131 (ND Okla. 2001) (tribal immunity barred a suit alleging copyright infringement, unfair competition, breach of contract, and other claims against a tribal business development agency).

In the wake of Kiowa, tribal immunity has also been exploited in new areas that are often heavily regulated by States. For instance, payday lenders (companies that lend consumers short-term advances on paychecks at interest rates that can reach upwards of 1,000 percent per annum) often arrange to share fees or profits with tribes so they can use tribal immunity as a shield for conduct of questionable legality. Martin & Schwartz, The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk? 69 Wash. & Lee L. Rev. 751, 758–759, 777 (2012). Indian tribes have also created conflict in certain States by asserting tribal immunity as a defense against violations of state campaign finance laws. See generally Moylan, Sovereign Rules of the Game: Requiring Campaign Finance Disclosure in the Face of Tribal Sovereign Immunity, 20 B. U. Pub. Interest
L. J. 1 (2010).

In sum, any number of Indian tribes across the country have emerged as substantial and successful competitors in interstate and international commerce, both within and beyond Indian lands. As long as tribal immunity remains out of sync with this reality, it will continue to invite problems, including *de facto* deregulation of highly regulated activities; unfairness to tort victims; and increasingly fractious relations with States and individuals alike. The growing harms wrought by *Kiowa*’s unjustifiable rule fully justify overruling it.

B

In support of its adherence to *stare decisis*, the majority asserts that “Congress has now reflected on *Kiowa*” and has decided to “retain” the decision. *Ante*, at 18; see also *ante*, at 19 (“[W]e act today against the backdrop of an apparent congressional choice: to keep tribal immunity . . . in a case like this one”). On its face, however, this is a curious assertion. To this day, Congress has never granted tribal sovereign immunity in *any* shape or form—much less immunity that extends as far as *Kiowa* went. What the majority really means, I gather, is that the Court must stay its hand because Congress has implicitly approved of *Kiowa*’s rule by not overturning it.

This argument from legislative inaction is unavailing. As a practical matter, it is “‘impossible to assert with any degree of assurance that congressional failure to act represents’ affirmative congressional approval of’” one of this Court’s decisions. *Patterson v. McLean Credit Union*, 491 U. S. 164, 175, n. 1 (1989) (quoting *Johnson v. Transportation Agency, Santa Clara Cty.*, 480 U. S. 616, 672 (1987) (SCALIA, J., dissenting)); see also *Girouard v. United States*, 328 U. S. 61, 69 (1946) (“It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law”); *Helvering v. Hallock*, 309 U. S. 106,
121 (1940) (“[W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle”). There are many reasons Congress might not act on a decision like *Kiowa*, and most of them have nothing at all to do with Congress’ desire to preserve the decision. See *Johnson*, 480 U. S., at 672 (SCALIA, J., dissenting) (listing various kinds of legislative inertia, including an “inability to agree upon how to alter the status quo” and “indifference to the status quo”).

Even assuming the general validity of arguments from legislative inaction, they are a poor fit in this common-law context. Such arguments are typically based on the premise that the failure of later Congresses to reject a judicial decision interpreting a statute says something about what Congress understands the statute to mean. See, e.g., id., at 629, n. 7 (majority opinion). But it is not clear why Congress’ unenacted “opinion” has any relevance to determining the correctness of a decision about a doctrine created and shaped by this Court. Giving dispositive weight to congressional silence regarding a common-law decision of this Court effectively codifies that decision based only on Congress’ failure to address it. This approach is at odds with our Constitution’s requirements for enacting law. Cf. *Patterson*, supra, at 175, n. 1 (“Congress may legislate . . . only through the passage of a bill which is approved by both Houses and signed by the President. Congressional inaction cannot amend a duly enacted statute” (citation omitted)). It is also the direct opposite of this Court’s usual approach in common-law cases, where we have made clear that, “in the absence of an applicable Act of Congress, federal courts must fashion the governing rules.” *National Metropolitan Bank*, 323 U. S., at 456; see also *supra*, at 11–12; *Moragne v. States Marine Lines, Inc.*, 398 U. S. 375, 378 (1970) (precedent barring recovery for wrongful death, “somewhat dubious even when rendered, is such an unjustifiable anomaly in the present maritime
THOMAS, J., dissenting

[common] law that it should no longer be followed\(^5\)).\(^5\) Allowing legislative inaction to guide common-law decisionmaking is not deference, but abdication.\(^6\)

In any event, because legislative inaction is usually

\(^5\)The majority appears to agree that the Court can revise the judicial doctrine of tribal immunity, because it reserves the right to make an “off-reservation” tort exception to Kiowa’s blanket rule. See ante, at 16, n. 8. In light of that reservation, the majority’s declaration that it is “Congress’s job . . . to determine whether or how to limit tribal immunity” rings hollow. Id., at 17. Such a judge-made exception would no more defer to Congress to “make the call whether to curtail a tribe’s immunity” than would recognizing that Kiowa was wrongly decided in the first instance. Id., at 18. In any event, I welcome the majority’s interest in fulfilling its independent responsibility to correct Kiowa’s mistaken extension of immunity “without any exceptions for commercial or off-reservation conduct.” Id., at 15. I regret only that the Court does not see fit to take that step today.

\(^6\)Of course, stare decisis still applies in the common-law context; I reject only the notion that arguments from legislative inaction have any place in the analysis.

I also reject the majority’s intimation that stare decisis applies as strongly to common-law decisions as to those involving statutory interpretation. The majority asserts that stare decisis should have “‘special force’” in this case because “‘Congress remains free to alter what we have done.’” Ante, at 16 (quoting Patterson v. McLean Credit Union, 491 U. S. 164, 172–173 (1989)). Although the Court has invoked this reasoning in the statutory context, I am not aware of a case in which we have relied upon it to preserve a common-law decision of this Court. Indeed, we have minimized that reasoning when interpreting the Sherman Act precisely because “the Court has treated the Sherman Act as a common-law statute.” Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U. S. 877, 899 (2007) (emphasis added); see also State Oil Co. v. Khan, 522 U. S. 3, 20–21 (1997) (“[T]he general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress ‘expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition’”). Surely no higher standard of stare decisis can apply when dealing with common law proper, which Congress certainly expects the Court to shape in the absence of legislative action. See, e.g., National Metropolitan Bank v. United States, 325 U. S. 454, 456 (1945).
indeterminate, we “require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines.” Girouard, supra, at 69. Here, the majority provides nothing that solidifies the inference of approval it draws from congressional silence in the wake of Kiowa.

First, the majority cites two Senate bills that proposed to abrogate tribal immunity for contract and tort claims against tribes. See S. 2299, 105th Cong., 2d Sess. (1998) (contract claims); S. 2302, 105th Cong., 2d Sess. (1998) (tort claims). Neither bill expresses Congress’ views on Kiowa’s rule, for both died in committee without a vote.

Second, the majority notes various post-Kiowa enactments that either abrogate tribal immunity in various limited contexts or leave it be. See ante, at 18, 19, n. 10. None of these enactments provides a reason to believe that Congress both considered and approved Kiowa’s holding. None of them targets with any precision the immunity of Indian tribes for off-reservation commercial activities. See, e.g., Indian Tribal Economic Development and Contract Encouragement Act of 2000 (codified at 25 U. S. C. §81(d)(2)) (for contracts that encumber Indian lands for more than seven years, tribes must either provide for breach-of-contract remedies or disclose tribal immunity if applicable). And given the exceedingly narrow contexts in which these provisions apply, see, e.g., Arizona Water Settlements Act, §213(a)(2), 118 Stat. 3531 (abrogating one tribe’s immunity for the limited purpose of enforcing water settlements), the far stronger inference is that Congress simply did not address Kiowa or its extension of immunity in these Acts; rather, Congress considered only whether an abrogation of judge-made tribal immunity was necessary to the narrow regulatory scheme on the table. See, e.g., Prevent All Cigarette Trafficking Act of 2009, §§2(e), 3(a), 124 Stat. 1101, 1108.

The majority posits that its inference of congressional
approval of Kiowa is stronger because Congress failed to act after the Kiowa Court “urg[ed]” Congress to consider the question presented. Ante, at 17, 19–20 (quoting Kiowa, 523 U. S., at 758) (“[W]e defer to the role Congress may wish to exercise in this important judgment”). But this circumstance too raises any number of inferences. Congress is under no obligation to review and respond to every statement this Court makes; perhaps legislative inertia simply won out. The majority seems to suggest that Congress understood Kiowa to assign the burgeoning problems of expansive common-law immunity to the Legislature, and then chose to let those problems fester. But Congress has not explained its inaction, and we should not pretend that it has done so by remaining silent after we supposedly prodded it to say something. Even if we credit the relevance of post-Kiowa congressional silence in this common-law context—and I do not—there is certainly not enough evidence of congressional acquiescence here “that we can properly place on the shoulders of Congress the burden of the Court’s own error.” Girouard, 328 U. S., at 69–70.

C

The majority’s remaining arguments for retaining Kiowa are also unconvincing.

First, the majority characterizes Kiowa as one case in a “long line of precedents” in which the Court has recognized tribal immunity “without any exceptions for commercial or off-reservation conduct.” Ante, at 15. True, the Court has relied on tribal immunity as a general matter in several cases. But not until Kiowa were we required to decide whether immunity should extend to commercial activities beyond Indian reservations. See supra, at 7. And after Kiowa, we have mentioned it only once, and then only in dicta. C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla., 532 U. S. 411, 418 (2001) (holding that the
Tribe had waived its immunity in a construction contract). Thus, overturning *Kiowa* would overturn *Kiowa* only.

Second, the majority suggests that tribes and their business partners have now relied on *Kiowa* in structuring their contracts and transactions. *Ante*, at 15. But even when *Kiowa* extended the scope of tribal immunity, it was readily apparent that the Court had strong misgivings about it. Not one Member of the *Kiowa* Court identified a substantive justification for its extension of immunity: Three would not have expanded the immunity in the first place, *Kiowa*, 523 U.S., at 760 (Stevens, J., dissenting), and the other six essentially expressed hope that Congress would overrule the Court’s decision, see *id.*, at 758–759. Against that backdrop, it would hardly be reasonable for a tribe to rely on *Kiowa* as a permanent grant of immunity for off-reservation commercial activities. In any event, the utter absence of a reasoned justification for *Kiowa*’s rule and its growing adverse effects easily outweigh this generalized assertion of reliance. See, e.g., *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 906 (2007) (in the antitrust context, overturning the *per se* rule against vertical price restraints in part because the “reliance interests” in the case could not “justify an inefficient rule”).

*   *   *

In *Kiowa*, this Court adopted a rule without a reason: a sweeping immunity from suit untethered from commercial realities and the usual justifications for immunity, premised on the misguided notion that only Congress can place sensible limits on a doctrine we created. The decision was mistaken then, and the Court’s decision to reaffirm it in the face of the unfairness and conflict it has engendered is doubly so. I respectfully dissent.
JUSTICE GINSBURG, dissenting.

I join JUSTICE THOMAS’ dissenting opinion with one reservation. Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998), held for the first time that tribal sovereign immunity extends to suits arising out of an Indian tribe’s off-reservation commercial activity. For the reasons stated in the dissenting opinion I joined in Kiowa, id., at 760–766 (opinion of Stevens, J.), and cogently recapitulated today by JUSTICE THOMAS, this Court’s declaration of an immunity thus absolute was and remains exorbitant. But I also believe that the Court has carried beyond the pale the immunity possessed by States of the United States. Compare ante, at 3, n. 3 (THOMAS, J., dissenting), with Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 100 (1996) (Souter, J., dissenting) (“[T]he Court today holds for the first time since the founding of the Republic that Congress has no authority to subject a State to the jurisdiction of a federal court at the behest of an individual asserting a federal right. . . . I part company from the Court because I am convinced its decision is fundamentally mistaken.”); Kimel v. Florida Bd. of Regents, 528 U. S. 62, 93 (2000) (Stevens, J., dissenting in part and concurring in part) (“Congress’ power to authorize federal remedies against state agencies that violate federal statutory obligations is coextensive with its power
to impose those obligations on the States in the first place. Neither the Eleventh Amendment nor the doctrine of sovereign immunity places any limit on that power.

Alden v. Maine, 527 U. S. 706, 814 (1999) (Souter, J., dissenting) (court’s enhancement of the States’ immunity from suit “is true neither to history nor to the structure of the Constitution”). Neither brand of immoderate, judicially confirmed immunity, I anticipate, will have staying power.
§ 139C. COBRA premium assistance

In the case of an assistance eligible individual (as defined in section 3001 of title III of division B of the American Recovery and Reinvestment Act of 2009), gross income does not include any premium reduction provided under subsection (a) of such section.


REFERENCES TO TEXT

AMENDMENTS

EFFECTIVE DATE OF 2010 AMENDMENT
Amendment by Pub. L. 111-144 effective as if included in the provisions of section 3001 of Pub. L. 111-5 to which it relates, see section 3(c) of Pub. L. 111-144, set out as a note under section 4123 of this title.

$139D. Free choice vouchers

Gross income shall not include the amount of any free choice voucher provided by an employer under section 10109 of the Patient Protection and Affordable Care Act to the extent that the amount of such voucher does not exceed the amount paid for a qualified health plan (as defined in section 1801 of such Act) by the taxpayer.


REFERENCES IN TEXT
Section 1801 of the Patient Protection and Affordable Care Act, referred to in text, is section 1801 of Pub. L. 111-148, which enacted this section and section 18101 of Title 42, The Public Health and Welfare, amended sections 3041, 152, 4800H, 3556, and 6702 of this title and section 2108 of Title 29, Labor, and enacted provisions set out as notes under this section and sections 3041, 152, 4800H, and 6702 of this title. For complete classification of section 10109 to the Code, see Tables.

Section 10101 of the Patient Protection and Affordable Care Act, referred to in text, is classified to section 10101 of Title 42, The Public Health and Welfare.

EFFECTIVE DATE

§139D. Indian health care benefits

(a) General rule

Except as otherwise provided in this section, gross income does not include the value of any qualified Indian health care benefit.

(b) Qualified Indian health care benefit

For purposes of this section, the term “qualified Indian health care benefit” means—

(1) any health service or benefit provided or purchased, directly or indirectly, by the Indian Health Service through a grant to or a contract or compact with an Indian tribe or tribal organization, or through a third-party program funded by the Indian Health Service,

(2) medical care provided or purchased by, or amounts to reimburse for such medical care provided by, an Indian tribe or tribal organization for, or to, a member of an Indian tribe, including a spouse or dependent of such a member,

(3) coverage under accident or health insurance (or an arrangement having the effect of accident or health insurance), or an accident or health plan, provided by an Indian tribe or tribal organization for medical care to a member of an Indian tribe, include a spouse or dependent of such a member, and

(4) any other medical care provided by an Indian tribe or tribal organization that supplements, replaces, or substitutes for a program or service relating to medical care provided by the Federal government to Indian tribes or members of such a tribe.

(c) Definitions

For purposes of this section—

(1) Indian tribe

The term “Indian tribe” has the meaning given such term by section 45A(c)(6).

(2) Tribal organization

The term “tribal organization” has the meaning given such term by section 45A(e)(6) of the Indian Self-Determination and Education Assistance Act.

(3) Medical care

The term “medical care” has the same meaning as when used in section 111.

(4) Accident or health insurance; accident or health plan

The terms “accident or health insurance” and “accident or health plan” have the same meaning as when used in section 105.

(5) Dependent

The term “dependent” has the meaning given such term by section 115, determined without regard to subsections (d)(1), (d)(2), and (d)(4)(B) thereof.

(d) Denial of double benefit

Subsection (a) shall not apply to the amount of any qualified Indian health care benefit which is not includible in gross income of the bene-
§140. Cross references to other Acts

(a) For exemption of—

(1) Allowances and expenditures to meet losses sustained by persons serving the United States abroad, due to appreciation of foreign currencies, see section 5357 of title 48, United States Code.

(2) Benefits provided to commissioned officers of the Public Health Service in certain circumstances, see section 212 of the Public Health Service Act (48 U.S.C. 213).


(b) Earnings of ship contractors deposited in special reserve funds, see section 5357 of title 48, United States Code.

(c) Income derived from Federal Reserve banks, including capital stock and surplus, see section 7 of the Federal Reserve Act (12 U.S.C. 631).

(d) Special pensions and annuities to members or officers of the United States Armed Forces, see section 200 of the United States Code.

(e) Earnings of ship contractors deposited in special reserve funds, see section 5357 of title 48, United States Code.

(f) Income derived from Federal Reserve banks, including capital stock and surplus, see section 7 of the Federal Reserve Act (12 U.S.C. 631).

(g) For extension of military income tax exemption to commissioned officers of the Public Health Service in certain circumstances, see section 212 of the Public Health Service Act (48 U.S.C. 213).

Public Law 113–168
113th Congress

An Act

To amend the Internal Revenue Code of 1986 to clarify the treatment of general welfare benefits provided by Indian tribes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Tribal General Welfare Exclusion Act of 2014".

SEC. 2. INDIAN GENERAL WELFARE BENEFITS.

(a) In General.--Part III of subchapter B of chapter 1 of the Internal Revenue Code of 1986 is amended by inserting before section 140 the following new section:

"SEC. 139E. INDIAN GENERAL WELFARE BENEFITS.

"(a) In General.--Gross income does not include the value of any Indian general welfare benefit.

"(b) Indian General Welfare Benefit.--For purposes of this section, the term 'Indian general welfare benefit' includes any payment made or services provided to or on behalf of a member of an Indian tribe (or any spouse or dependent of such a member) pursuant to an Indian tribal government program, but only if—

"(1) the program is administered under specified guidelines and does not discriminate in favor of members of the governing body of the tribe, and

"(2) the benefits provided under such program—

"(A) are available to any tribal member who meets such guidelines,

"(B) are for the promotion of general welfare,

"(C) are not lavish or extravagant, and

"(D) are not compensation for services.

"(c) Definitions and Special Rules.--For purposes of this section—

"(1) Indian Tribal Government.--For purposes of this section, the term 'Indian tribal government' includes any agencies or instrumentalities of an Indian tribal government and any Alaska Native regional or village corporation, as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (43 U.S.C. 1601, et seq.).

"(2) Dependent.—The term 'dependent' has the meaning given such term by section 152, determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B).

"(3) Lavish or Extravagant.—The Secretary shall, in consultation with the Tribal Advisory Committee (as established by the Alaska Native Claims Settlement Act (43 U.S.C. 1601, et seq.), or as established, amended, or certified under any other law), establish guidelines..."
under section 3(a) of the Tribal General Welfare Exclusion
Act of 2013), establish guidelines for what constitutes lavish
or extravagant benefits with respect to Indian tribal govern-
ment programs.

“(4) ESTABLISHMENT OF TRIBAL GOVERNMENT PROGRAM.—
A program shall not fail to be treated as an Indian tribal
government program solely by reason of the program being
established by tribal custom or government practice.

“(5) CEREMONIAL ACTIVITIES.—Any items of cultural signifi-
cance, reimbursement of costs, or cash honorarium for participa-
tion in cultural or ceremonial activities for the transmission
of tribal culture shall not be treated as compensation for serv-
ices.”.

(b) CONFORMING AMENDMENT.—The table of sections for part
III of subchapter B of chapter 1 of such Code is amended by
inserting before the item relating to section 140 the following new
item:

“Sec. 139E. Indian general welfare benefits.”.

(c) STATUTORY CONSTRUCTION.—Ambiguities in section 139E
of such Code, as added by this Act, shall be resolved in favor
of Indian tribal governments and deference shall be given to Indian
tribal governments for the programs administered and authorized
by the tribe to benefit the general welfare of the tribal community.

(d) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by this section
shall apply to taxable years for which the period of limitation
on refund or credit under section 6511 of the Internal Revenue
Code of 1986 has not expired.

(2) ONE-YEAR WAIVER OF STATUTE OF LIMITATIONS.—If the
period of limitation on a credit or refund resulting from the
amendments made by subsection (a) expires before the end
of the 1-year period beginning on the date of the enactment
of this Act, refund or credit of such overpayment (to the extent
attributable to such amendments) may, nevertheless, be made
or allowed if claim therefore is filed before the close of such
1-year period.

SEC. 3. TRIBAL ADVISORY COMMITTEE.

(a) ESTABLISHMENT.—The Secretary of the Treasury shall estab-
ish a Tribal Advisory Committee (hereinafter in this subsection
referred to as the “Committee”).

(b) DUTIES.—

(1) IMPLEMENTATION.—The Committee shall advise the Secre-
tary on matters relating to the taxation of Indians.

(2) EDUCATION AND TRAINING.—The Secretary shall, in con-

sultation with the Committee, establish and require—

(A) training and education for internal revenue field
agents who administer and enforce internal revenue laws
with respect to Indian tribes on Federal Indian law and
the Federal Government’s unique legal treaty and trust
relationship with Indian tribal governments, and

(B) training of such internal revenue field agents, and
provision of training and technical assistance to tribal
financial officers, about implementation of this Act and
the amendments made thereby.

(c) MEMBERSHIP.—
PUBLIC LAW 113–168—SEPT. 26, 2014 128 STAT. 1885

(1) IN GENERAL.—The Committee shall be composed of 7 members appointed as follows:

(A) Three members appointed by the Secretary of the Treasury.

(B) One member appointed by the Chairman, and one member appointed by the Ranking Member, of the Committee on Ways and Means of the House of Representatives.

(C) One member appointed by the Chairman, and one member appointed by the Ranking Member, of the Committee on Finance of the Senate.

(2) TERM.—

(A) IN GENERAL.—Except as provided in subparagraph (B), each member’s term shall be 4 years.

(B) INITIAL STAGGERING.—The first appointments made by the Secretary under paragraph (1)(A) shall be for a term of 2 years.

SEC. 4. OTHER RELIEF FOR INDIAN TRIBES.

(a) TEMPORARY SUSPENSION OF EXAMINATIONS.—The Secretary of the Treasury shall suspend all audits and examinations of Indian tribal governments and members of Indian tribes (or any spouse or dependent of such a member), to the extent such an audit or examination relates to the exclusion of a payment or benefit from an Indian tribal government under the general welfare exclusion, until the education and training prescribed by section 3(b)(2) of this Act is completed. The running of any period of limitations under section 6501 of the Internal Revenue Code of 1986 with respect to Indian tribal governments and members of Indian tribes shall be suspended during the period during which audits and examinations are suspended under the preceding sentence.

(b) WAIVER OF PENALTIES AND INTEREST.—The Secretary of the Treasury may waive any interest and penalties imposed under such Code on any Indian tribal government or member of an Indian tribe (or any spouse or dependent of such a member) to the extent such interest and penalties relate to excluding a payment or benefit from gross income under the general welfare exclusion.

(c) DEFINITIONS.—For purposes of this subsection—

(1) INDIAN TRIBAL GOVERNMENT.—The term "Indian tribal government" shall have the meaning given such term by section 139E of such Code, as added by this Act.
(2) INDIAN TRIBE.—The term "Indian tribe" shall have the meaning given such term by section 45A(c)(6) of such Code.

Approved September 26, 2014.
Panel One – Challenging Issues

The Law: Toolkit for Native Cultural Protection!...Or Disruption?

Marguerite Smith, Esq.
Protecting Peoples, Places & Perspectives
Competent & Creative Practice of Indian Law

Marguerite A. Smith
Attorney at Law
Admitted in New York State, 1975
Admitted to USDC, EDNY, SDNY, WDNY

msmasesq@gmail.com
Enrolled Citizen, Shinnecock Indian Nation
Ethical Requirements

NYS

Is Cultural Competency an Ethical Duty

Skill Sets:

Executive Order 13175 (November 6, 2000 )
- Consultation & Coordination with Indian Tribal Governments;
- President’s Memorandum on Tribal Consultation (Nov.5, 2009)

US Department of Justice Federal Register 2013

Protecting the Children

ICWA

25 USC 1901 et seq

Guidelines

Regulations Proposed

New York State

Social Services Law

Desk Aid OCFS

Protecting Places & Cultures: Ancestors, Artifacts, et al

SEQRA,

NEPA, NHPA, NAGPRA
Bureau of Indian Affairs, Interior

(b) The Superintendent or his/her designated representative must render a written decision within 10 days of the completion of the hearing. The written decision must include:
(1) A written statement covering the evidence relied upon and reasons for the decision; and
(2) The applicant’s or recipient’s right to appeal the Superintendent or his/her designated representative’s decision pursuant to 25 CFR part 2 and request Bureau assistance in preparation of the appeal.

§20.705 Can an applicant or recipient appeal a tribal decision?
Yes, the applicant or recipient must pursue the appeal process applicable to the Public Law 93-638 contract, Public Law 102-477 grant, or Public Law 103-413 self-governance annual funding agreement. If no appeal process exists, then the applicant or recipient must pursue the appeal through the appropriate tribal forum.

PART 23—INDIAN CHILD WELFARE ACT

Subpart A—Purpose, Definitions, and Policy
Sec.
23.1 Purpose.
23.2 Definitions.
23.3 Policy.
23.4 Information collection.

Subpart B—Notice of Involuntary Child Custody Proceedings and Payment for Appointed Counsel in State Courts

23.11 Notice.
23.12 Designated tribal agent for service of notice.
23.13 Payment for appointed counsel in involuntary Indian child custody proceedings in state courts.

Subpart C—Grants to Indian Tribes for Title II Indian Child and Family Service Programs

23.21 Noncompetitive tribal government grants.
23.22 Purpose of tribal government grants.

23.23 Tribal government application contents.

Subpart D—Grants to Off-Reservation Indian Organizations for Title II Indian Child and Family Service Programs

23.31 Competitive off-reservation grant process.
23.32 Purpose of off-reservation grants.
23.33 Competitive off-reservation application contents and application selection criteria.
23.34 Review and decision on off-reservation applications by Area Director.
23.35 Deadline for Central Office action.

Subpart E—General and Uniform Grant Administration Provisions and Requirements

23.41 Uniform grant administration provisions, requirements and applicability.
23.42 Technical assistance.
23.43 Authority for grant approval and execution.
23.44 Grant administration and monitoring.
23.45 Subgrants.
23.46 Financial management, internal and external controls and other assurances.
23.47 Reports and availability of information to Indians.
23.48 Matching shares and agreements.
23.49 Fair and uniform provision of services.
23.50 Service eligibility.
23.51 Grant carry-over authority.
23.52 Grant suspension.
23.53 Cancellation.

Subpart F—Appeals

23.61 Appeals from decision or action by Agency Superintendent, Area Director or Grants Officer.
23.62 Appeals from decision or action by Area Director under Subpart D.
23.63 Appeals from inaction of official.

Subpart G—Administrative Provisions

23.71 Recordkeeping and information availability.

Subpart H—Assistance to State Courts

23.81 Assistance in identifying witnesses.
23.82 Assistance in identifying language interpreters.
23.83 Assistance in locating biological parents of Indian child after termination of adoption.

Source: 59 FR 2256, Jan. 13, 1994, unless otherwise noted.
Subpart A—Purpose, Definitions, and Policy

§ 23.1 Purpose.


§ 23.2 Definitions.

Assistant Secretary means the Assistant Secretary—Indian Affairs, the Department of the Interior.
Bureau of Indian Affairs (BIA) means the Bureau of Indian Affairs, the Department of the Interior.
Child custody proceedings includes:
1. Foster care placement, which shall mean any action removing an Indian child from the care of his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;
2. Termination of parental rights, which shall mean any action resulting in the termination of the parent-child relationship;
3. Preadoptive placement, which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement;
4. Adoptive placement, which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption;
5. Other tribal placements made in accordance with the placement preferences of the Act, including the temporary or permanent placement of an Indian child in accordance with tribal children’s codes and local tribal custom or tradition;
6. The above terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime in the jurisdiction where the act occurred or upon an award, in a divorce proceeding, of custody to one of the parents.

Consortium means an association or partnership of two or more eligible applicants who enter into an agreement to administer a grant program and to provide services under the grant to Indian residents in a specific geographical area where it is administratively feasible to provide an adequate level of services within the area.

Extended family member shall be as defined by the law or custom of the Indian child’s tribe or, in the absence of such law or custom, shall be a person who has reached the age of 18 and who is the Indian child’s grandparents, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

Grant means a written agreement between the BIA and the governing body of an Indian tribe or Indian organization wherein the BIA provides funds to the grantee to plan, conduct or administer specific programs, services, or activities and where the administrative and programmatic provisions are specifically delineated.

Grantee means the tribal governing body of an Indian tribe or Board of Directors of an Indian organization responsible for grant administration.

Grants officer means an officially designated officer who administers IOWA grants awarded by the Bureau of Indian Affairs, the Department of the Interior.

Indian means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 7 of the Alaska Native Claims Settlement Act, 43 U.S.C. 1606.

Indian child means any unmarried person who is under age 18 and is either a member of an Indian tribe, or is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

Indian child’s tribe means the Indian tribe in which an Indian child is a member or is eligible for membership or, in the case of an Indian child who is a member of or is eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts, to be determined in accordance with the BIA’s
Bureau of Indian Affairs, Interior

“Guidelines for State Courts—Indian Child Custody Proceedings.”

Indian custodian means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law, or to whom temporary physical care, custody and control has been transferred by the parent of such child.

Indian organization, solely for purposes of eligibility for grants under subpart D of this part, means any legally established group, association, partnership, corporation, or other legal entity which is owned or controlled by Indians, or a majority (61 percent or more) of whose members are Indians.

Indian preference means preference and opportunities for employment and training provided to Indians in the administration of grants in accordance with section 7 (b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 460).

Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians federally recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 3 (c) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1602 (c).

Off-reservation ICWA program means an ICWA program administered in accordance with 25 U.S.C. 1903 by an off-reservation Indian organization.

Parent means the biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. The term does not include the unwed father where paternity has not been acknowledged or established.

Reservation means Indian country as defined in 18 U.S.C. 1151 and any lands not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation.

Secretary means the Secretary of the Interior.

Service areas solely for newly recognized or restored Indian tribes without established reservations means those service areas congressionally established by Federal law to be the equivalent of a reservation for the purpose of determining the eligibility of a newly recognized or restored Indian tribe and its members for all Federal services and benefits.

State court means any agent or agency of a state, including the District of Columbia, or any territory or possession of the United States, or any political subdivision empowered by law to terminate parental rights or to make foster care placements, preadoptive placements, or adoptive placements.

Subgrant means a secondary grant that undertakes part of the obligations of the primary grant, and assumes the legal and financial responsibility for the funds awarded and for the performance of the grant-supported activity.

Technical assistance means the provision of oral, written, or other relevant information and assistance to prospective grant applicants in the development of their grant proposals. Technical assistance may include a preliminary review of an application to assist the applicant in identifying the strengths and weaknesses of the proposal, ongoing program planning, design and evaluation, and such other program-specific assistance as is necessary for ongoing grant administration and management.

Title II means title II of Public Law 95–608, the Indian Child Welfare Act of 1978, which authorizes the Secretary to make grants to Indian tribes and off-reservation Indian organizations for the establishment and operation of Indian child and family service programs.

Tribal Court means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

Tribal government means the federally recognized governing body of an Indian tribe.

Value means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.
§ 23.3 Policy.

In enacting the Indian Child Welfare Act of 1978, Pub. L. 95-608, the Congress has declared that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and Indian families by the establishment of minimum Federal standards to prevent the arbitrary removal of Indian children from their families and tribes, and to ensure that measures which prevent the breakup of Indian families are followed in child custody proceedings (25 U.S.C. 1903). Indian child and family service programs receiving title II funds and operated by federally recognized Indian tribes and off-reservation Indian organizations shall reflect the unique values of Indian culture and promote the stability and security of Indian children, Indian families and Indian communities. It is the policy of the Bureau of Indian Affairs to emphasize and facilitate the comprehensive design, development and implementation of Indian child and family service programs in coordination with other Federal, state, local, and tribal programs which strengthen and preserve Indian families and Indian tribes.

§ 23.4 Information collection.

(a) The information collection requirements contained in §§ 23.21 through 23.31 of this part have been approved by the Office of Management and Budget (OMB) under 44 U.S.C. 3501 et seq., and assigned clearance number 1050-011. This information will be used to determine eligibility for payment of legal fees for indigent Indian parents and Indian custodians, involved in involuntary Indian child custody proceedings in state courts, who are not eligible for legal services through other mechanisms. Response to this request is required to obtain a benefit.

(b) Public reporting for the information collection at §§ 23.21 and 23.31 is estimated to average 32 hours per response, including the time for reviewing the grant application instructions, gathering the necessary information and data, and completing the grant application. Public reporting for the information collection at §§ 23.21 and 23.31 is estimated to average a combined total of 18 annual hours per grantee, including the time for obtaining the necessary information and data, and completing the required forms and reports. Public reporting for the information collection at § 23.71 is estimated to average 4 hours per response, including the time for obtaining and preparing the final adoption decree for transmittal to the Secretary.
§ 23.11 Notice.

(a) In any involuntary proceeding in a state court where the court knows or has reason to know that an Indian child is involved, and where the identity or location of the child’s Indian parents or custodians or tribe is known, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall directly notify the Indian parents, Indian custodians, and the child’s tribe by certified mail with return receipt requested, of the pending proceeding and of their right of intervention. Notice shall include requisite information identified at paragraphs (d)(1) through (4) and (e)(1) through (6) of this section, consistent with the confidentiality requirement in paragraph (e)(7) of this section. Copies of these notices shall be sent to the Secretary and the appropriate Area Director listed in paragraphs (c)(1) through (12) of this section.

(b) If the identity or location of the Indian parents, Indian custodians or the child’s tribe cannot be determined, notice of the pendency of any involuntary child custody proceeding involving an Indian child in a state court shall be sent by certified mail with return receipt requested to the appropriate Area Director listed in paragraphs (c)(1) through (12) of this section. In order to establish tribal identity, it is necessary to provide as much information as is known on the Indian child’s direct lineal ancestors including, but not limited to, the information delineated at paragraph (d)(1) through (4) of this section.

(c)(1) For proceedings in Alabama, Connecticut, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia or any territory or possession of the United States, notices shall be sent to the following address: Eastern Area Director, Bureau of Indian Affairs, 370 N. Fairfax Drive, Suite 200, Arlington, Virginia 22209.

(c)(2) For proceedings in Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio, or Wisconsin, notices shall be sent to the following address: Minneapolis Area Director, Bureau of Indian Affairs, 331 Second Avenue South, Minneapolis, Minnesota 55401.

(c)(3) For proceedings in Nebraska, North Dakota, or South Dakota, notices shall be sent to the following address: Aberdeen Area Director, Bureau of Indian Affairs, 115 Fourth Avenue, SE, Aberdeen, South Dakota 57401.

(c)(4) For proceedings in Kansas, Texas (except for notices to the Ysleta del Sur Pueblo of El Paso County, Texas), and the western Oklahoma counties of Alfalfa, Beaver, Baca, Blaine, Caddo, Canadian, Cimarron, Cleveland, Comanche, Cotton, Custer, Dewey, Ellis, Garfield, Grant, Greer, Harper, Jackson, Kay, Kingfisher, Kiowa, Lincoln, Major, Noble, Oklahoma, Pawnee, Payne, Pottawatomie, Roger Mills, Texas, Tillman, Washita, Woods and Woodward, notices shall be sent to the following address: Anadarko Area Director, Bureau of Indian Affairs, P.O. Box 368, Anadarko, Oklahoma 73005.

(c)(5) Notices to the Ysleta del Sur Pueblo of El Paso County, Texas shall be sent to the Albuquerque Area Director at the address listed in paragraph (c)(6) of this section.

(c)(6) For proceedings in Wyoming or Montana (except for notices to the Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana), notices shall be sent to the following address: Billings Area Director, Bureau of Indian Affairs, 315 N. 22nd Street, Billings, Montana 59101.
§23.11

Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana, shall be sent to the Portland Area Director at the address listed in paragraph (c)(11) of this section.

(9) For proceedings in the Texas counties of El Paso and Hudspeth and proceedings in Colorado or New Mexico (exclusive of notices to the Navajo Tribe from the New Mexico counties listed in paragraph (c)(9) of this section), notices shall be sent to the following address: Albuquerque Area Director, Bureau of Indian Affairs, 615 First Street, P.O. Box 26539, Albuquerque, New Mexico 87125. Notices to the Navajo Tribe shall be sent to the Navajo Area Director at the address listed in paragraph (c)(9) of this section.

(7) For proceedings in Alaska (except for notices to the Metlakatla Indian Community, Alaska), notices shall be sent to the following address: Juneau Area Director, Bureau of Indian Affairs, 700 West 9th Street, Juneau, Alaska 99803-1219. Notices to the Metlakatla Indian Community of the Annette Islands Reserve, Alaska, shall be sent to the Portland Area Director at the address listed in paragraph (c)(11) of this section.

(8) For proceedings in Arkansas, Missouri, and the eastern Oklahoma counties of Adair, Atoka, Bryan, Carter, Cherokee, Craig, Creek, Choctaw, Coal, Delaware, Garvin, Grady, Haskell, Hughes, Jefferson, Johnson, Latimer, LeFlore, Love, Mayes, McCurtain, McIntosh, Murray, Muskogee, Nowata, Okfuskee, Okmulgee, Osage, Ottawa, Pittsburg, Pontotoc, Pushmataha, Marshall, Rogers, Sequiota, Sequoyah, Wagoner, Washington, Stephens, and Tulsa, notices shall be sent to the following address: Muskogee Area Director, Bureau of Indian Affairs, 101 North Fifth Street, Muskogee, Oklahoma 74401.

(9) For proceedings in the Arizona counties of Apache, Coconino (except for notices to the Hopi and San Juan Pueblo Tribes) and Navajo (except for notices to the Hopi Tribe); the New Mexico counties of McKinley (except for notices to the Zuñi Tribe), San Juan, and Socorro; and the Utah county of San Juan, notices shall be sent to the following address: Navajo Area Director, Bureau of Indian Affairs, P.O. Box 1096, Gallup, New Mexico 87301. Notices to the Hopi and San Juan Pueblo Tribes shall be sent to the Phoenix Area Director at the address listed in paragraph (c)(10) of this section. Notices to the Zuñi Tribe shall be sent to the Albuquerque Area Director at the address listed in paragraph (c)(6) of this section.

(10) For proceedings in Arizona (exclusive of notices to the Navajo Tribe from those counties listed in paragraph (c)(9) of this section), Nevada or Utah (exclusive of San Juan county), notices shall be sent to the following address: Phoenix Area Director, Bureau of Indian Affairs, 1 North First Street, P.O. Box 10, Phoenix, Arizona 85001.

(11) For proceedings in Idaho, Oregon or Washington, notices shall be sent to the following address: Portland Area Director, Bureau of Indian Affairs, 911 NE 11th Avenue, Portland, Oregon 97232. All notices to the Confederated Salish & Kootenai Tribes of the Flathead Reservation, located in the Montana counties of Flathead, Lake, Missoula, and Sanders, shall also be sent to the Portland Area Director.

(12) For proceedings in California or Hawaii, notices shall be sent to the following address: Sacramento Area Director, Bureau of Indian Affairs, Federal Office Building, 2600 Cottage Way, Sacramento, California 95825.

(d) Notice to the appropriate Area Director pursuant to paragraph (b) of this section may be sent by certified mail with return receipt requested or by personal service and shall include the following information, if known:

(1) Name of the Indian child, the child’s birthdate and birthplace.

(2) Name of Indian tribe(s) in which the child is enrolled or may be eligible for enrollment.

(3) All names known, and current and former addresses of the Indian child’s biological mother, biological father, maternal and paternal grandparents and great grandparents or Indian custodians, including maiden, married and former names or aliases; birthdates; places of birth and death; tribal enrollment numbers, and/or other identifying information.
§ 23.13

A copy of the petition, complaint or other document by which the proceeding was initiated.

(2) In addition, notice provided to the appropriate Area Director pursuant to paragraph (a) of this section shall include the following:

1. A statement of the absolute right of the biological Indian parents, the child's Indian custodians and the child's tribe to intervene in the proceeding.

2. A statement that if the Indian parent(s) or Indian custodian(s) is (are) unable to afford counsel, and where a state court determines indigency, counsel will be appointed to represent the Indian parent or Indian custodian where authorized by state law.

3. A statement of the right of the Indian parents, Indian custodians and child's tribe to be granted, upon request, up to 20 additional days to prepare for the proceedings.

4. The location, mailing address, and telephone number of the court and all parties notified pursuant to this section.

5. A statement of the right of the Indian parents, Indian custodians and the child's tribe to petition the court for transfer of the proceeding to the child's tribal court pursuant to 25 U.S.C. 1911, absent objection by either parent. Provided, that such transfer shall be subject to declination by the tribal court of said tribe.

6. A statement of the potential legal consequences of the proceedings on the future custodial and parental rights of the Indian parents or Indian custodians.

7. A statement that, since child custody proceedings are conducted on a confidential basis, all parties notified shall keep confidential the information contained in the notice concerning the particular proceeding. The notice shall not be handled by anyone not needing the information contained in the notices in order to exercise the tribe's rights under the Act.

8. Upon receipt of the notice, the Secretary or his/her designee shall make reasonable documented efforts to locate and notify the child's tribe and the child's Indian parents or Indian custodians. The Secretary or his/her designee shall have 15 days, after receipt of the notice from the persons initiating the proceedings, to notify the child's tribe and Indian parents or Indian custodians and send a copy of the notice to the court. If within the 15-day period the Secretary or his/her designee is unable to verify that the child meets the criteria of an Indian child as defined in 25 U.S.C. 1903, or is unable to locate the Indian parents or Indian custodians, the Secretary or his/her designee shall so inform the court prior to initiation of the proceedings and state how much more time, if any, will be needed to complete the search. The Secretary or his/her designee shall complete all research efforts, even if those efforts cannot be completed before the child custody proceeding begins.

9. Upon request from a party to an Indian child custody proceeding, the Secretary or his/her designee shall make a reasonable attempt to identify and locate the child's tribe, Indian parents or Indian custodians to assist the party seeking the information.

§ 23.12 Designated tribal agent for service of notice.

Any Indian tribe entitled to notice pursuant to 25 U.S.C. 1912 may designate by resolution, or by such other form as the tribe's constitution or current practice requires, an agent for service of notice other than the tribal chairman and send a copy of the designation to the Secretary or his/her designee. The Secretary or his/her designee shall update and publish as necessary the names and addresses of the designated agents in the Federal Register. A current listing of such agents shall be available through the area offices.

§ 23.13 Payment for appointed counsel in involuntary Indian child custody proceedings in state courts.

(a) When a state court appoints counsel for an indigent Indian party in an involuntary Indian child custody proceeding for which the appointment of counsel is not authorized under state law, the court shall send written notice of the appointment to the BIA Area Director designated for that state in §23.11. The notice shall include the following:
§ 23.13

(1) Name, address, and telephone number of attorney who has been appointed.

(2) Name and address of client for whom counsel is appointed.

(3) Relationship of client to child.

(4) Name of Indian child's tribe.

(5) Copy of the petition or complaint.

(6) Certification by the court that state law makes no provision for appointment of counsel in such proceedings.

(7) Certification by the court that the Indian client is indigent.

(b) The Area Director shall certify that the client is eligible to have his or her appointed counsel compensated by the BIA unless:

(1) The litigation does not involve a child custody proceeding as defined in 25 U.S.C. 1903 (1);

(2) The child who is the subject of the litigation is not an Indian child as defined in 25 U.S.C. 1903 (4);

(3) The client is neither the Indian child who is the subject of the litigation, the Indian child's parent as defined in 25 U.S.C. 1903 (9), nor the child's Indian custodian as defined in 25 U.S.C. 1903 (6).

(4) State law provides for appointment of counsel in such proceedings;

(5) The notice to the Area Director of appointment of counsel is incomplete; or

(6) Funds are not available for the particular fiscal year.

(c) No later than 10 days after receipt of the notice of appointment of counsel, the Area Director shall notify the court, the client, and the attorney in writing whether the client has been certified as eligible to have his or her attorney fees and expenses paid by the BIA. If certification is denied, the notice shall include written reasons for that decision, together with a statement that complies with 25 CFR 2.27 and that informs the applicant that the decision may be appealed to the Assistant Secretary. The Assistant Secretary shall consider appeals under this subsection in accordance with 25 CFR 2.20 (c) through (e). Appeal procedures shall be as set out in part 2 of this chapter.

(d) When determining attorney fees and expenses, the court shall:

(1) Determine the amount of payment due appointed counsel by the same procedures and criteria it uses in determining the fees and expenses to be paid appointed counsel in state juvenile delinquency proceedings; and

(2) Submit approved vouchers to the Area Director who certifies eligibility for BIA payment, together with the court's certification that the amount requested is reasonable under the state standards considering the work actually performed in light of criteria that apply in determining fees and expenses for appointed counsel in state juvenile delinquency proceedings.

(e) The Area Director shall authorize the payment of attorney fees and expenses in the amount requested in the voucher approved by the court unless:

(1) The amount of payment due the state-appointed counsel is inconsistent with the fees and expenses specified in 25 CFR 2.13 (d) (1); or

(2) The client has not been certified previously as eligible under paragraph (c) of this section; or

(3) The voucher is submitted later than 90 days after completion of the legal action involving a client certified as eligible for payment of legal fees under paragraph (b) of this section.

(f) No later than 15 days after receipt of a payment voucher, the Area Director shall send written notice to the court, the client, and the attorney stating the amount of payment, if any, that has been authorized. If the payment has been denied, or the amount authorized is less than the amount requested in the voucher approved by the court, the notice shall include a written statement of the reasons for the decision together with a statement that complies with 25 CFR 2.27 and that informs the applicant that the decision may be appealed to the Interior Board of Indian Appeals in accordance with 25 CFR 4.310 through 4.318 and 43 CFR 4.330 through 4.349.

(g) Failure of the Area Director to meet the deadline specified in paragraphs (c) and (f) of this section may be treated as a denial for purposes of appeal under paragraph (f) of this section.

(h) Payment for appointed counsel does not extend to Indian tribes involved in state court child custody proceedings or to Indian families involved in Indian child custody proceedings in tribal courts.
Subpart C—Grants to Indian Tribes for Title II Indian Child and Family Service Programs

§23.21 Noncompetitive tribal government grants.
(a) Grant application information and technical assistance. Information on grant application procedures and related information may be obtained from the appropriate Agency Superintendents or Area Directors. Pre-award and ongoing technical assistance to tribal governments shall be provided in accordance with §23.43 of this part.
(b) Eligibility requirements for tribal governments. The tribal government(s) of any Indian tribe or consortium of tribes may submit a properly documented application for a grant to the appropriate Agency Superintendent or Area Director. A tribe may neither submit more than one application for a grant nor be the beneficiary of more than one grant under this subpart.
(1) Through the publication of a Federal Register announcement at the outset of the implementation of the noncompetitive grant award process during which tribal applications will be solicited, the Assistant Secretary will notify eligible tribal applicants under this subpart of the amount of core funds available for their ICWA program. The funding levels will be based on the service area population to be served. Upon the receipt of this notice from the appropriate Area Director, tribal applicants shall submit a completed ICWA application no later than 60 days after the receipt of this notice.
(2) A grant to be awarded under this subpart shall be limited to the tribal governing body(ies) of the tribe(s) to be served by the grant.
(3) For purposes of eligibility for newly recognized or restored Indian tribes without established reservations, such tribes shall be deemed eligible to apply for grants under this subpart to provide ICWA services within those service areas legislatively identified for such tribes.
(4) A grantee under this subpart may make a subgrant to another Indian tribe or an Indian organization subject to the provisions of §23.45.
(c) Revision or amendment of grants. A grantee under this subpart may submit a written request and justification for a post-award grant modification covering material changes to the terms and conditions of the grant, subject to the approval of the grants officer. The request shall include a narrative description of any significant additions, deletions, or changes to the approved program activities or budget in the form of a grant amendment proposal.
(d) Continued annual funding of an ICWA grant under this subpart shall be contingent upon the fulfillment of the requirements delineated at §23.22(a).
(e) Monitoring and program reporting requirements for grantees under this subpart are delineated at §§23.44 and 23.47.

§23.22 Purpose of tribal government grants.
(a) Grants awarded under this subpart are for the establishment and operation of tribally designed Indian child and family service programs. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and to ensure that the permanent removal of an Indian child from the custody of his or her Indian parent or Indian custodian shall be a last resort. Such child and family service programs may include, but need not be limited to:
(1) A system for licensing or otherwise regulating Indian foster and adoptive homes, such as establishing tribal standards for approval of on-reservation foster or adoptive homes;
(2) The operation and maintenance of facilities for counseling and treatment of Indian families and for the temporary custody of Indian children with the goal of strengthening Indian families and preventing parent-child separations;
(3) Family assistance, including homemaker and home counselors, protective day care and afterschool care, recreational activities, respite care, and employment support services with the goal of strengthening Indian families and contributing to family stability;
(4) Home improvement programs with the primary emphasis on preventing the removal of children due to
unoutside home environments by making homes safer, but not to make extensive structural home improvements;  
(5) The employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters, but not to establish tribal court systems;  
(6) Education and training of Indians, including tribal judges and staff, in skills relating to child and family assistance and service programs;  
(7) A subsidy program under which Indian adoptive children not eligible for state or EPA subsidy programs may be provided support comparable to that for which they could be eligible as foster children, taking into account the appropriate state standards of support for maintenance and medical needs;  
(8) Guidance, legal representation and advice to Indian families involved in tribal, state, or Federal child custody proceedings; and  
(9) Other programs designed to meet the intent and purposes of the Act.  
(b) Grants may be provided to tribes in the preparation and implementation of child welfare codes within their jurisdiction or pursuant to a tribal-state agreement.  
(c) Grantees under this subpart may enhance their capabilities by utilizing ICWA funds as non-Federal matching shares in connection with funds provided under titles IV-B, IV-D and XX of the Social Security Act or other Federal programs which contribute to and promote the intent and purposes of the Act through the provision of comprehensive child and family services in coordination with other tribal, Federal, state, and local resources available for the same purpose.  
(d) Program income resulting from the operation of programs under this subpart, such as day care operations, may be retained and used for purposes similar to those for which the grant was awarded.  
§23.23 Tribal government application contents.  
(a) The appropriate Area Director shall, subject to the tribe's fulfillment of the mandatory application requirements and the availability of appropriated funds, make a grant to the tribal governing body of a tribe or consortium of tribes eligible to apply for a grant under this subpart.  
(b) The following mandatory tribal application requirements must be submitted to the appropriate Agency Superintendent or Area Director in accordance with the timeframe established in §23.31 (b) of this subpart:  
(1) A current tribal resolution requesting a grant by the Indian tribe(s) to be served by the grant. If an applicant is applying for a grant benefiting more than one tribe (consortium), an authorizing resolution from each tribal government to be served must be included. The request must be in the form of a current tribal resolution by the tribal governing body and shall include the following information:  
(i) The official name of tribe(s) applying for the grant and who will directly benefit from or receive services from the grant;  
(ii) The proposed beginning and ending dates of the grant;  
(iii) A provision stating that the resolution will remain in effect for the duration of the program or until the resolution expires or is rescinded; and  
(iv) The signature of the authorized representative of the tribal government and the date thereof.  
(2) A completed Application for Federal Assistance form, SF-424.  
(3) A narrative needs assessment of the social problems or issues affecting the resident Indian population to be served; the geographic area(s) to be served; and estimated number of resident Indian families and/or persons to receive benefits or services from the program.  
(4) A comprehensive developmental multi-year plan in narrative form describing what specific services and/or activities will be provided each program year and addressing the above-identified social problems or issues. At a minimum, the plan must include:  
(i) The program goals and objectives, stated in measurable terms, to be achieved through the grant;  
(ii) A narrative description of how Indian families and communities will benefit from the program; and
Bureau of Indian Affairs, Interior

§ 23.31

(ii) The methodology, including culturally defined approaches, and procedures by which the tribe(s) will accomplish the identified goals and objectives.

(5) An internal monitoring system to measure progress and accomplishments, and to assure that the quality and quantity of actual performance conforms to the requirements of the grant.

(6) A staffing plan that is consistent with the implementation of the above-described program plan of operation and the procedures necessary for the successful delivery of services.

(i) The plan must include proposed key personnel, their qualifications, training or experience relevant to the services to be provided, responsibilities, Indian preference criteria for employment, and position descriptions.

(ii) In accordance with 25 U.S.C. 2901 et seq. (Pub. L. 101-630), title IV, the Indian Child Protection and Family Violence Prevention Act, grantees shall conduct character and background investigations of those personnel identified in that statute. Grantees must initiate character and background investigations of said personnel prior to their actual employment, and complete the investigations in a timely manner.

(7) A program budget and budget narrative justification submitted on an annual basis for the amount of the award and supported by the proposed plan, appropriate program services and activities for the applicable grant year.

(8) Identification of any consultants and/or subgrantees the applicant proposes to employ; a description of the consultant and/or subgrantees services to be rendered; the qualifications and experience in performing the identified services; and the basis for the cost and amount to be paid for such services.

(9) A certification by a licensed accountant that the bookkeeping and accounting procedures which the tribe(s) uses or intends to use meet existing Federal standards for grant management and administration specified at §23.46.

(10) A system for managing property and recordkeeping which complies with subpart D of 43 CFR part 3 implementing the Privacy Act (5 U.S.C. 552a) and with existing Federal requirements for grants at 25 CFR 276.5 and 276.11, including the maintenance and safeguarding of direct service case records on families and/or individuals served by the grant.

(11) A listing of equipment, facilities, and buildings necessary to carry out the grant program. Liability insurance coverage for buildings and their contents is recommended for grantees under this subpart.

(12) Pursuant to the Drug-Free Workplace Act of 1988, tribal programs shall comply with the mandatory Drug-Free Workplace Certification, a regulatory requirement for Federal grant recipients.

(c) Continued annual funding of an ICWA program under this subpart shall be contingent upon the existing grant program receiving a satisfactory program evaluation from the area social services office for the previous year of operation. A copy of this evaluation must be submitted together with an annual budget and budget narrative justification in accordance with paragraph (b)(7) of this section. Minimum standards for receiving a satisfactory evaluation shall include:

(1) The timely submission of all fiscal and programmatic reports;

(2) A narrative program report indicating work accomplished in accordance with the applicant's approved multi-year plan and, if applicable, a description of any modification in programs or activities to be funded in the next fiscal year; and

(3) The implementation of mutually determined corrective action measures, if applicable.

Subpart D—Grants to Off-Reservation Indian Organizations for Title II Indian Child and Family Service Programs

§23.31 Competitive off-reservation grant process.

(a) Grant application procedures and related information may be obtained from the Area Director designated at §23.11 for processing ICWA notices for the state in which the applicant is located. Pre-award and ongoing technical assistance of off-reservation Indian organization grantees shall be provided in accordance with §23.42.
§ 23.32 Purpose of off-reservation grants.

The Secretary or his/her designee is authorized to make grants to off-reservation Indian organizations to establish and operate off-reservation Indian child and family service programs for the purpose of stabilizing Indian families and tribes, preventing the breakup of Indian families and, in particular, to ensure that the permanent removal of an Indian child from the custody of his/her Indian parent or Indian custodian shall be a last resort. Child and family service programs may include, but are not limited to:

(a) A system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate state standards of support for maintenance and medical needs;

(b) The operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children with the goal of strengthening and stabilizing Indian families;

(c) Family assistance (including homemaker and home counseling), protective day care and after-school care, employment support services, recreational activities, and respite care with the goal of strengthening Indian families and contributing toward family stability; and

(d) Guidance, legal representation and advice to Indian families involved in state child custody proceedings.

§ 23.33 Competitive off-reservation application contents and application selection criteria.

(a) An application for a competitive multi-year grant under this subpart shall be submitted to the appropriate Area Director prior to or on the announced deadline date published in the Federal Register. The Area Director shall certify the application contents pursuant to §23.31 and forward the application within five working days to the area review committee, composed
of members designated by the Area Director for competitive review and action. Modifications and/or information received after the close of the application period, as announced in the Federal Register, shall not be reviewed or considered by the Area review committee in the competitive process.

(b) Mandatory application requirements for Indian organization applicants shall include:

(1) An official request for an ICWA grant program from the organization's board of directors covering the duration of the proposed program;

(2) A completed Application for Federal Assistance form, SF 424;

(3) Written assurances that the organization meets the definition of Indian organization at §23.2;

(4) A copy of the organization's current Articles of Incorporation for the applicable grant years;

(5) Proof of the organization's non-profit status;

(6) A copy of the organization's IRS tax exemption certificate and IRS employer identification number;

(7) Proof of liability insurance for the applicable grant years; and

(8) Current written assurances that the requirements of Circular A-122 for fiscal management, accounting, and recordkeeping are met.

(9) Pursuant to the Drug-Free Workplace Act of 1988, all grantees under this subpart shall comply with the mandatory Drug-Free Workplace Certification, a regulatory requirement for Federal grant recipients.

(c) Competitive application selection criteria. The Area Director or his/her designated representative shall select those proposals which will in his/her judgment best promote the purposes of the Act. Selection shall be made through the area review committee process in which each application will be scored individually and ranked according to score, taking into consideration the mandatory requirements as specified above and the following selection criteria:

(1) The degree to which the application reflects an understanding of the social problems or issues affecting the resident Indian client population which the applicant proposes to serve;

(2) Whether the applicant presents a narrative needs assessment, quantitative data and demographics of the client Indian population to be served;

(3) Estimates of the number of Indian people to receive benefits or services from the program based on available data;

(4) Program goals and objectives to be achieved through the grant;

(5) A comprehensive developmental multi-year narrative plan describing what specific services and/or activities will be provided each program year and addressing the above-identified social problems or issues. At a minimum, the plan must include a narrative description of the program; the program goals and objectives, stated in measurable terms, to be achieved through the grant; and the methodology, including culturally defined approaches, and procedures by which the grantee will accomplish the identified goals and objectives;

(6) An internal monitoring system the grantee will use to measure progress and accomplishments, and to ensure that the quality and quantity of actual performance conforms to the requirements of the grant;

(7) Documentation of the relative accessibility which the Indian population to be served under a specific proposal already has to existing child and family service programs emphasizing the prevention of Indian family breakdowns, such as mandatory state services. Factors to be considered in determining accessibility include:

   (i) Cultural barriers;

   (ii) Discrimination against Indians;

   (iii) Inability of potential Indian clientele to pay for services;

   (iv) Technical barriers created by existing public or private programs;

   (v) Availability of transportation to existing programs;

   (vi) Distance between the Indian community to be served under the proposal and the nearest existing programs;

   (vii) Quality of services provided to Indian clientele, and

   (viii) Relevance of services provided to specific needs of the Indian clientele.

(b) If the proposed program duplicates existing Federal, state, or local...
child and family service programs emphasizing the prevention of Indian family breakup, proper and current documented evidence that repeated attempts to obtain services have been unsuccessful;

(9) Evidence of substantial support from the Indian community or communities to be served, including but not limited to:
   (i) Tribal support evidenced by a tribal resolution or cooperative service agreements between the administrative bodies of the affected tribe(s) and the applicant for the duration of the grant period, or
   (ii) Letters of support from social services organizations familiar with the applicant’s past work experience;

(10) A staffing plan that is consistent with the implementation of the above-described program plan of operation and the procedures necessary for the successful delivery of services. The plan must include proposed key personnel, their qualifications, training and experience relevant to the services to be provided, responsibilities, Indian preference criteria for employment and position descriptions. In accordance with 25 U.S.C. 3231 et seq. (Pub. L. 101–690, title IV, the Indian Child Protection and Family Violence Prevention Act, grantees shall conduct character and background investigations of those personnel identified in that statute prior to their actual employment;

(11) The reasonableness and relevance of the estimated overall costs of the proposed program or services and their overall relation to the organization’s funding base, activities, and mission;

(12) The degree to which the detailed annual budget and justification for the requested funds are consistent with, and clearly supported by, the proposed plan and by appropriate program services and activities for the applicable grant year;

(13) The applicant’s identification of any consultants and/or subgrantees it proposes to employ; description of the services to be rendered; the qualifications and experience of said personnel, reflecting the requirements for performing the identified services; and the basis for the cost and the amount to be paid for each service;

(14) Certification by a licensed accountant that the bookkeeping and accounting procedures that the applicant uses or intends to use meet existing Federal standards for grant administration and management specified at §23.48;

(15) The compliance of property management and recordkeeping systems with subpart D of 25 CFR part 2 (the Privacy Act; 5 U.S.C. 552a), and with existing Federal requirements for grants at 25 CFR 275.5 and 276.11, including the maintenance and safeguarding of direct service case records on families and/or individuals served by the grant;

(16) A description of the proposed facilities, equipment, and buildings necessary to carry out the grant activities; and

(17) Proof of liability insurance coverage for the applicable grant year(s).

(d) Two or more applications receiving the same competitive score will be prioritized in accordance with announcements made in the FEDERAL REGISTER pursuant to §23.31 (b) for the applicable year(s).

(e) Continued annual funding of a multi-year grant award to an off-reservation IOWA program under this subpart shall be contingent upon the availability of appropriated funds and upon the existing grant program receiving a satisfactory program evaluation from the area social services office for the previous year of operation. A copy of this evaluation shall be submitted together with an annual budget and budget narrative justification in accordance with paragraph (c)(10) of this section. Minimum standards for receiving a satisfactory evaluation shall include the timely submission of all fiscal and programmatic reports; a narrative program report indicating work accomplished in accordance with the initial approved multi-year plan; and the implementation of mutually determined corrective action measures, if applicable.

§23.34 Review and decision on off-reservation applications by Area Director.

(a) Area office certification. Upon receipt of an application for a grant by an off-reservation Indian organization
at the area office, the Area Director shall:

(1) Complete and sign the area office certification form. In completing the area certification form, the Area Director shall assess and certify whether applications contain and meet all the application requirements specified at §23.38. Area Directors shall be responsible for the completion of the area office certification forms for all applications submitted by off-reservation Indian organizations.

(2) Acknowledge receipt of the application to the applicant and advise the applicant of the disposition of the application within 10 days of receipt; and

(3) Transmit all applications within five working days of receipt to the area review committee for competitive review and subsequent approval or disapproval of the applications.

(b) Area office competitive review and decision for off-reservation applications. Upon receipt of an application for an off-reservation grant under this part requiring the approval of the Area Director, the Area Director shall:

(1) Establish and convene an area review committee, chaired by a person qualified by knowledge, training and experience in the delivery of Indian child and family services.

(2) Review the area office certification form required in paragraph (a) of this section.

(3) Review the application in accordance with the competitive review procedures prescribed in §23.33. An application shall not receive approval for funding under the area competitive review and scoring process unless a review of the application determines that it:

(1) Contains all the information required in §23.33 which must be received by the close of the application period. Modifications of the grant application received after the close of the application period shall not be considered in the competitive review process.

(11) Receives at least the established minimum score in an area competitive review, using the application selection criteria and scoring process set out in §23.33. The minimum score shall be established by the Central Office prior to each application period and announced in the Federal Register for the applicable grants year(s).

(4) Approve or disapprove the application and promptly notify the applicant in writing of the approval or disapproval of the application. If the application is disapproved, the Area Director shall include in the written notice the specific reasons therefore.

(c) The actual funding amounts for the initial grant year shall be subject to appropriations available nationwide and the continued funding of an approved off-reservation grant application under subpart D of this part shall be subject to available funds received by the respective area office for the applicable grant year. Initial funding decisions and subsequent decisions with respect to funding level amounts for all approved grant applications under this part shall be made by the Area Director.

§23.35 Deadline for Central Office action.

Within 30 days of the receipt of grant reporting forms from the Area Directors identifying approved and disapproved applications pursuant to subpart D of this part and recommended funding levels for approved applications, the Secretary or his/her designee shall process the Area Directors' funding requests.

Subpart E—General and Uniform Grant Administration Provisions and Requirements

§23.41 Uniform grant administration provisions, requirements and applicability.

The general and uniform grant administration provisions and requirements specified at 25 CFR part 278 and under this subpart are applicable to all grants awarded to tribal governments and off-reservation Indian organizations under this part, except to the extent inconsistent with an applicable Federal statute, regulation or OMB circular.

§23.42 Technical assistance.

(a) Pre-award and ongoing technical assistance may be requested by an Indian tribe or off-reservation Indian organization from the appropriate agency.
§ 23.43
or area office to which the tribe or organization will be submitting an application for funds under subparts C and D of this part. A request for pre-award technical assistance by an off-reservation Indian organization must be received by the Area Director designated at §23.11 for the state in which the applicant is located no later than 10 days prior to the application deadline to assure sufficient time for area response.

(b) Pre-award and ongoing technical assistance may be provided by the appropriate BIA agency or area office for purposes of program planning and design, assistance in establishing internal program monitoring and evaluation criteria for ongoing grant administration and management, and for other appropriate assistance requested.

(c) The area social services staff shall provide technical assistance to grantees upon receipt of an authorized request from the grantee or when review of the grantee’s quarterly performance reports shows that:

(1) An ICWA program is yielding results that are or will be detrimental to the welfare of the intended Indian beneficiaries of the program;

(2) A program has substantially failed to implement its goals and objectives;

(3) There are serious irregularities in the fiscal management of the grant; or

(4) The grantee is otherwise deficient in its program performance.

(d) Upon receiving an authorized request from the grantee, the area social services staff and/or grants officer shall provide the necessary technical assistance to arrive at mutually determined corrective action measures and their actual implementation, if necessary, and the timeframes within which said corrective actions will be implemented.

§ 23.44 Authority for grant approval and execution.

(a) Tribal government programs. The appropriate Agency Superintendent or Area Director may approve a grant application and its subsequent execution under subpart C when the intent, purpose and scope of the application pertains solely to reservations located within the service area jurisdiction of the agency or area office.

(b) Off-reservation programs. The appropriate Area Director may approve a grant application and its subsequent execution under subpart D when the intent, purpose and scope of the grant proposal pertains to off-reservation Indian service populations or programs.

§ 23.45 Grant administration and monitoring.

All grantees under this part shall be responsible for managing day-to-day program operations to ensure that program performance goals are being achieved and to ensure compliance with the provisions of the grant award document and other applicable Federal requirements. Unless delegated to the Agency Superintendent, appropriate area office personnel designated by the Area Director shall be responsible for all grant program and fiscal monitoring responsibilities.

§ 23.46 Subgrants.

A tribal government grantee may make a subgrant under subpart C of this part, provided that such subgrants are for the purpose for which the grant was made and that the grantee retains administrative and financial responsibility over the activity and the funds.

§ 23.47 Financial management, internal and external controls and other assurances.

Grantee financial management systems shall comply with the following standards for accurate, current and complete disclosure of financial activities.

(a) OMB Circular A-37 (Cost principles for state and local governments and federally recognized Indian tribal governments).

(b) OMB Circular A-102 (Common rule 43 CFR part 12).

(c) OMB Circular A-123 (Single Audit Act).

(d) OMB Circular A-110 or 122 (Cost principles for non-profit organisations and tribal organisations, where applicable).

(e) Internal control. Effective control and accountability must be maintained for all grants. Grantees must adequately safeguard any property and must ensure that it is used solely for authorized purposes.
§ 23.47 Reports and availability of information to Indians.

(a) Any tribal government or off-reservation Indian organization receiving a grant under this part shall make general programmatic information and reports concerning that grant available to the Indian people it serves or represents. Access to this information may be requested in writing and shall be made available within 10 days of receipt of the request. Except as required by title IV of Pub. L. 101-350, the Indian Child Protection and Family Violence Prevention Act, grantees shall hold confidential all information obtained from persons receiving services from the program, and shall not release such information without the individual's written consent. Information may be disclosed in a manner which does not identify or lead to the identification of particular individuals.

(b) Grantees shall submit Standard Form 269 or 269A on a quarterly and annual basis to report their status of funds by the dates specified in the grant award document.

(c) Grantees shall furnish and submit the following written quarterly and annual program reports by the dates specified in the award document:

(1) Quarterly and annual statistical and narrative program performance reports which shall include, but need not be limited to, the following:

(a) A summary of actual accomplishments and significant activities as related to program objectives established for the grant period;

(b) The grantees' evaluation of program performance using the internal monitoring system submitted in their application;

(c) Reports on all significant ICWA direct service grant activities including but not limited to the following information:

(A) Significant title II activities;

(B) Data reflecting numbers of individuals referred for out-of-home placements, number of individuals benefiting from title II services and types of services provided, and

(C) Information and referral activities;


(v) A summary of problems encountered or reasons for not meeting established objectives;

(vi) Any deliverable or product required in the grant; and

(vii) Additional pertinent information when appropriate.

(2) The BIA may negotiate for the provision of other grant-related reports not previously identified.

(d) Events may occur between scheduled performance reporting dates which have significant impact on the grant-supported activity. In such cases, the grantee must inform the awarding
§ 23.48 Matching shares and agreements.

(a) Grant funds provided to Indian tribes under subpart C of this part may be used as non-Federal matching shares in connection with funds provided under titles IV-B, IV-E and XX of the Social Security Act or such other Federal programs which contribute to and promote the purposes of the Act as specified in §§23.3 and 23.22 (25 U.S.C. 1931).

(b) Pursuant to 25 U.S.C. 1933, in furtherance of the establishment, operation, and funding of programs funded under subparts C and D of this part, the Secretary may enter into agreements with the Secretary of Health and Human Services. The latter Secretary is authorized by the Act to use funds appropriated for the Department of Health and Human Services for programs similar to those funded under subparts C and D of this part (25 U.S.C. 1921 and 1932), provided that authority to make payment pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation Acts.

§ 23.49 Fair and uniform provision of services.

(a) Grants awarded under this part shall include provisions assuring compliance with the Indian Civil Rights Act; prohibiting discriminatory distinctions among eligible Indian beneficiaries; and assuring the fair and uniform provision by the grantees of the services and assistance they provide to eligible Indian beneficiaries under such grants. Such procedures must include criteria by which eligible Indian beneficiaries will receive services, record-keeping mechanisms adequate to verify the fairness and uniformity of services in cases of formal complaints, and an explanation of what rights will be afforded an individual pending the resolution of a complaint.

(b) Indian beneficiaries of the services to be rendered under a grant shall be afforded access to administrative or judicial bodies empowered to adjudge complaints, claims, or grievances brought by such Indian beneficiaries against the grantee arising out of the performance of the grant.

§ 23.50 Service eligibility.

(a) Tribal government Indian child and family service programs. Any person meeting the definition of Indian, Indian child, Indian custodian, or Indian parent of any unmarried person under the age of 18 as defined in §23.2 is eligible for services provided under 25 U.S.C. 1931 of the Act. Tribal membership status shall be determined by tribal law, ordinance, or custom. The tribe may, under subpart C, extend services to nontribal family members related by marriage to tribal members, provided such services promote the intent and purposes of the Act. A tribe may also, within available resources, extend services under this part to individuals who are members of, or are eligible for membership in other Indian tribes, and who reside within the tribe's designated service area.

(b) Off-reservation Indian child and family service programs and agreements with the Secretary of Health and Human Services pursuant to 25 U.S.C. 1933. For purposes of eligibility for services provided under 25 U.S.C. 1932 and 1933 of the Act, any person meeting the definition of Indian, Indian child, Indian custodian, or Indian parent of any unmarried person under the age of 18 as defined in §23.2, or the definition of Indian as defined in 25 U.S.C. 1609(c), shall be eligible for services. Tribal membership status shall be determined by tribal law, ordinance, or custom.

§ 23.51 Grant carry-over authority.

Unless restricted by appropriation, and contingent upon satisfactory program evaluations from the appropriate area or agency office for an existing program, grantees are authorized to carry over unliquidated grant funds which remain at the end of a budget period. Such funds may be carried over for a maximum period of two years beyond the initial grant funding period.
and must be utilized only for the intent, purpose and scope of the original grant. These carry-over grant funds shall not be reprogrammed into other appropriation activities or subactivities. Funds carried over into another fiscal year will be added to the grantee’s new fiscal year funding amount.

§23.52 Grant suspension.

(a) When a grantee has materially failed to comply and remains out of compliance with the terms and conditions of the grant, the grants officer may, after reasonable notice to the grantee and the provision of requested technical assistance, suspend the grant. The notice preceding the suspension shall include the effective date of the suspension, the corrective measures necessary for reinstatement of the grant and, if there is no immediate threat to safety, a reasonable timeframe for corrective action prior to actual suspension.

(b) No obligation incurred by the grantee during the period of suspension shall be allowable under the suspended grant, except that the grants officer may at his/her discretion allow necessary and proper costs which the grantee could not reasonably avoid during the period of suspension if such costs would otherwise be allowable under the applicable cost principles.

(c) Appropriate adjustments to the payments under the suspended grant will be made either by withholding the payments or by not allowing the grantee credit for disbursements which the grantee may make in liquidation of unauthorized obligations the grantee incurs during the period of suspension.

(d) Suspension shall remain in effect until the grantee has taken corrective action to the satisfaction of the grants officer, or given assurances satisfactory to the grants officer that corrective action will be taken, or until the grants officer cancels the grant.

§23.53 Cancellation.

(a) The grants officer may cancel any grant, in whole or in part, at any time before the date of completion whenever it is determined that the grantee has:

1. Materially failed to comply with the terms and conditions of the grant;

2. Violated the rights as specified in §23.49 or endangered the health, safety, or welfare of any person; or

3. Been grossly negligent in, or has mismanaged the handling or use of funds provided under the grant.

(b) When it appears that cancellation of the grant will become necessary, the grants officer shall promptly notify the grantee in writing of this possibility. This written notice shall advise the grantee of the reason for the possible cancellation and the corrective action necessary to avoid cancellation. The grants officer shall also offer, and shall provide, if requested by the grantee, any technical assistance which may be required to effect the corrective action. The grantee shall have 90 days in which to effect this corrective action before the grants officer provides notice of intent to cancel the grant as provided for in paragraph (c) of this section.

(c) Upon deciding to cancel for cause, the grants officer shall promptly notify the grantee in writing of that decision, the reason for the cancellation, and the effective date. The Area Director or his/her designated official shall also provide a hearing for the grantee before cancellation. However, the grants officer may immediately cancel the grant upon notice to the grantee, if the grants officer determines that continuation of the grant poses an immediate threat to safety. In this event, the Area Director or his/her designated official shall provide a hearing for the grantee within 10 days of the cancellation.

(d) The hearing referred to in paragraph (c) of this section shall be conducted as follows:

1. The grantee affected shall be notified, in writing, at least 10 days before the hearing. The notice should give the date, time, place, and purpose of the hearing.

2. A written record of the hearing shall be made. The record shall include written statements submitted at the hearing or within five days following the hearing.
Subpart F—Appeals

§ 23.61 Appeals from decision or action by Agency Superintendent, Area Director or Grants Officer.

A grantee or prospective applicant may appeal any decision made or action taken by the Agency Superintendent, Area Director, or grants officer under subpart C or E of this part. Such an appeal shall be made to the Assistant Secretary who shall consider the appeal in accordance with 25 CFR 2.20 (c) through (o). Appeal procedures shall be set out in part 2 of this chapter.

§ 23.62 Appeals from decision or action by Area Director under subpart D.

A grantee or applicant may appeal any decision made or action taken by the Area Director under subpart D that is alleged to be in violation of the U.S. Constitution, Federal statutes, or the regulations of this part. These appeals shall be filed with the Interior Board of Indian Appeals in accordance with 25 CFR 2.4 (e), 43 CFR 4.310 through 4.318 and 43 CFR 4.320 through 4.390. However, an applicant may not appeal a score assigned to its application or the amount of grant funds awarded.

§ 23.63 Appeals from inaction of official.

A person or persons whose interests are adversely affected, or whose ability to protect such interests is impeded by the failure of an official to act on a request to the official, may make the official’s inaction the subject of an appeal under part 2 of this chapter.

Subpart G—Administrative Provisions

§ 23.71 Recordkeeping and information availability.

(a)(1) Any state court entering a final decree or adoptive order for any Indian child shall provide the Secretary or his/her designee within 30 days a copy of said decree or order, together with any information necessary to show:

(i) The Indian child’s name, birthdate and tribal affiliation, pursuant to 25 U.S.C. 1951;

(ii) Names and addresses of the biological parents and the adoptive parents; and

(iii) Identity of any agency having relevant information relating to said adoptive placement.

(2) To assure and maintain confidentiality, where the biological parent(s) have by affidavit requested that their identity remain confidential, a copy of such affidavit shall be provided to the Secretary or his/her designee. Information provided pursuant to 25 U.S.C. 1951(a) is not subject to the Freedom of Information Act (5 U.S.C. 552), as amended. The Secretary or his/her designee shall ensure that the confidentiality of such information is maintained. The address for the transmittal of information required by 25 U.S.C. 1951(a) is: Chief, Division of Social Services, Bureau of Indian Affairs, 1849 C Street, NW., Mail Stop 316-SIB, Washington, DC 20240. The envelope containing all such information should be marked “Confidential.” This address shall be sent to the highest court of appeal, the Attorney General and the Governor of each state. In some states, a state agency has been designated to be repository for all state court adoption information. Where such a system is operative, that agency may assume reporting responsibilities for the purposes of the Act.

(b) The Division of Social Services, Bureau of Indian Affairs, is authorized to receive all information and to maintain a central file on all state Indian adoptions. This file shall be confidential and only designated persons shall have access to it. Upon the request of an adopted Indian individual over the age of 18, the adoptive or foster parents of an Indian child, or an Indian tribe, the Division of Social Services shall disclose such information as may be necessary for purposes of tribal enrollment or determining any rights or benefits associated with tribal membership, except the names of the biological parents where an affidavit of confidentiality has been filed, to those persons eligible under the Act to request such information. The chief tribal enrollment officer of the BIA is authorized to disclose enrollment information relating to an adopted Indian child where the biological parents have by affidavit
requested anonymity. In such cases, the chief tribal enrollment officer shall certify the child’s tribe, and, where the information warrants, that the child’s parents and other circumstances entitle the child to enrollment consideration under the criteria established by the tribe.

Subpart H—Assistance to State Courts

§ 23.81 Assistance in identifying witnesses.

Upon the request of a party in an involuntary Indian child custody proceeding or of a court, the Secretary or his/her designee shall assist in identifying qualified expert witnesses. Such requests for assistance shall be sent to the Area Director designated in § 23.11(c). The BIA is not obligated to pay for the services of such expert witnesses.

§ 23.82 Assistance in identifying language interpreters.

Upon the request of a party in an Indian child custody proceeding or of a court, the Secretary or his/her designee shall assist in identifying language interpreters. Such requests for assistance should be sent to the Area Director designated in § 23.11(c). The BIA is not obligated to pay for the services of such language interpreters.

§ 23.83 Assistance in locating biological parents of Indian child after termination of adoption.

Upon the request of a party in a child placement agency, the court or an Indian tribe, the Secretary or his/her designee shall assist in locating the biological parents or prior Indian custodians of an adopted Indian child whose adoption has been terminated pursuant to 25 U.S.C. 1914. Such requests for assistance should be sent to the Area Director designated in § 23.11(c).

PART 26—JOB PLACEMENT AND TRAINING PROGRAM

Subpart A—General Applicability

Sec. 26.1 What terms do I need to know?

26.2 Who authorizes this collection of information?
26.3 What is the purpose of the Job Placement and Training Program?
26.4 Who administers the Job Placement and Training Program?
26.5 Who may be eligible for Job Placement and Training?
26.6 Who is eligible to receive financial assistance?
26.7 How is financial need established?
26.8 Where do I go to apply for Job Placement and Training assistance?
26.9 How do I apply for assistance?
26.10 When will I find out if I have been selected for Job Placement and Training assistance?
26.11 What type of Job Placement and Training assistance may be approved?
26.12 Who provides the Job Placement and Training?
26.13 How long may I be in training and how long can I receive other assistance?
26.14 What or who is a service provider?
26.15 What makes an applicant eligible for Job Placement and Training services?
26.16 If I am awarded financial assistance, how much will I receive?
26.17 Can more than one family member be financially assisted at the same time?
26.18 What kinds of supportive services are available?
26.19 Will I be required to contribute financially to my employment and training goals?
26.20 Can I be required to return portions of my grant?
26.21 Can this program be combined with other similar programs for maximum benefit?
26.22 May a tribe integrate Job Placement and Training funds into its Public Law 103-477 Plan?
26.23 What is an Individual Self-Sufficiency Plan (ISP)?

Subpart B—Job Placement Services

26.24 What is the scope of the Job Placement Program?
26.25 What constitutes a complete Job Placement Program application?
26.26 What job placement services may I receive?
26.27 What kind of job placement support services can I expect?
26.28 What follow-up services are available after I become employed?

Subpart C—Training Services

26.29 What is the scope of the Job Training Program?
26.30 Does the Job Training Program provide part-time training or short-term training?
26.31 May I repeat my job training?
CHAPTER 2.1

STATE ENVIRONMENTAL QUALITY REVIEW ACT

PROJECT ENVIRONMENTAL GUIDELINES

August 1998
2.1 STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA)

TABLE OF CONTENTS

I. Summary
II. Definitions
III. Applicability
IV. Procedures
V. Citations
VI. Additional information
VII. Attachments

2.1.A. 17 NYCRR Part 15 - Procedures for Implementation of State Environmental Quality Review Act
2.1.B. Type II List and Method to Determine Type II Classification
2.1.C. NYSDEC List of Type I Actions
2.1.D. Full Environmental Assessment Form (EAF)
2.1.E. Short Environmental Assessment Form (EAF)
2.1.F. Environmental Notice Bulletin - Publication Form
2.1.G. NYSDEC Scoping List

I. SUMMARY

The State Environmental Quality Review Act (SEQRA) and, in particular, the Department's implementing regulations -- 17 NYCRR Part 15, require the Department to consider environmental factors in its planning, review and decision making. Under SEQRA, all agencies must determine whether actions they directly undertake, fund or approve may have a significant effect on the environment. To minimize or avoid adverse environmental impacts the Department must modify its projects to the maximum extent practicable.

NYSDOT must assess all actions to determine whether the SEQRA process applies. Two types of actions are not subject to SEQRA review: Excluded Actions and Exempt Actions. A third type of action, Type II Actions, has been determined not to have a significant effect on the environment. If an action is one of these three types of actions, the SEQRA process ends. If an action is Non-Type II, an environmental assessment is prepared. After review of the environmental assessment, if the action will not have significant environmental effects, a Determination of No Significant Effect ("Negative Declaration") is filed. If the action may have significant environmental effects, a Determination That a
Project May Have a Significant Effect ("Positive Declaration") is filed and a Draft Environmental Impact Statement (DEIS) and Final Environmental Impact Statement (FEIS) are prepared.

17 NYCRR Part 15 §15.17 (Procedures For Implementation of State Environmental Quality Review Act) ("the Procedures"), attached hereto as Attachment 2.1.A., contains a flow chart of the SEQRA process. These regulations were adopted by NYSDOT for the purpose of implementing the State Environmental Quality Review Act. Please also note that this document provides appropriate reference to various sections of the Procedures, attached hereto as Attachment 2.1.A. Such references appear as "(See Attachment 2.1.A: §XX.XX...)".

The procedures in 17 NYCRR Part 15 vary from the procedures set forth in 6 NYCRR Part 617. 17 NYCRR Part 15 allows the Department to establish a procedure for SEQRA that corresponds with and is integrated into procedures for compliance with the National Environmental Policy Act (NEPA). The guidance contained herein is intended to describe the processes to follow to comply with SEQRA. However, if there is federal funding or approval involved, compliance with NEPA is also required. Documents developed in compliance with NEPA can generally be used to satisfy the requirements of SEQRA. For instance, the Department's Environmental Assessments/Design Reports fulfill the SEQRA environmental assessment requirements. The substance of the NEPA Finding of No Significant Impact (FONSI) can be used to support the SEQRA Negative Declaration, which needs to be prepared; and an Environmental Impact Statement (EIS) would suffice for both NEPA and SEQRA processes. For further guidance on compliance with NEPA, please refer to Chapter 2.B, FHWA/UMTA Environmental Impact and Related Procedures, in the Environmental Procedures Manual.

II. DEFINITIONS

**Action** - A project or planned activity which results in the creation, alteration or new use of a structure, facility or land and which is (I) directly undertaken by the Department, (ii) is funded by the Department, (iii) requires the issuance of a new or modified permit by the Department (see Attachment 2.1.A.: §15.2(a)).

**Agency** - Any state or local agency subject to the requirements of SEQRA.

**Coordinated Review** - All the involved and interested agencies cooperate in one integrated environmental review process.

**Critical Environmental Areas (CEA)** - As authorized under NYSDEC regulation, areas designated by state or local agencies that are of exceptional or unique character. An action located in or substantially contiguous to a CEA is presumed to be a Non-Type II Action (see Attachment 2.1.A: §15.14(7)(X)).
**Department** - New York State Department of Transportation.

**Direct Action** - As defined by 17 NYCRR §15.2(h).

1. A project or physical activity that results in the creation, alteration or new use of a structure, facility or land which will, upon completion or operation, be under the jurisdiction of the Department, or
2. Making policy, regulations or procedures.

**Draft Environmental Impact Statement (DEIS)** - A draft of an Environmental Impact Statement circulated for public review.

**Environmental Assessment Form (EAF)** - A form completed to identify information needed to make a determination of the significance of environmental effects of a project. There is a full form (see Attachment 2.1.D.) used when a project exceeds a NYSDEC Type I (see Attachment 2.1.C) threshold and a short form (see Attachment 2.1.E.) used for other actions.

**Environmental Impact Statement (EIS)** - The document prepared to provide all necessary environmental information to help state agencies consider environmental concerns when making decisions on proposed actions.

**Exempt Actions** - As defined by 17 NYCRR §15.2(m) and 17 NYCRR §§15.12-15.13, certain actions that are not subject to SEQRA requirements.

**Excluded Actions** - As defined by 17 NYCRR §15.2(l), additional actions including "grand fathered" actions that are not subject to SEQRA requirements.

**Final Environmental Impact Statement (FEIS)** - The final version of the Environmental Impact Statement that incorporates comments on the Draft Environmental Impact Statement.

**Generic EIS** - Generic EISs (GEIS) may be broader and more general than site or project-specific EISs and should discuss the logic and rationale for the alternatives advanced. GEISs may be based on conceptual information in some cases. They should focus on broad issues, such as general location, mode choice and area-wide air quality and land use implications of the major alternative. They can discuss the constraints and consequences of any narrowing of future options and may present and analyze hypothetical scenarios.

**Involved Agency** - An agency that will have to make a discretionary decision with respect to an action such as funding, permitting or approving.

**Lead Agency** - An involved agency principally responsible for undertaking or approving an action and primarily responsible for SEQRA compliance.
Ministerial Action - As defined in 17 NYCRR §15.2(s), an act performed upon a given state of facts in a prescribed manner imposed by law without the exercise of any judgment or discretion as to the propriety of the action, although the law may require some interpretation or construction. A list of ministerial actions is found in 17 NYCRR §15.13.

Negative Declaration - A determination by the lead agency that an action will not result in a significant adverse environmental impact; therefore, no EIS will be prepared.

Non-Type II Action - Actions that are not Type II, exempt, excluded or ministerial and require an environmental review in accordance with 17 NYCRR Part 15, Section 15.6.

Positive Declaration - A determination by the lead agency that an action may result in a significant adverse environmental impact and an EIS will be prepared.

Record of Decision - As defined in 17 NYCRR §15.2(v), a public document stating the decision of the Department, stating facts and conclusions in the EIS on which the Department relied in making its decision and containing the specific findings required under SEQRA.

Segmentation - The entire set of activities constituting a project is considered an action. Segmentation is environmental review of an action such that various activities or stages of such an action are analyzed as though they were independent, unrelated activities needing individual determinations of significance. Segmentation is contrary to SEQRA (see "III. APPLICABILITY" below).

Type II Actions - Actions or classes of actions, listed in 17 NYCRR §15.14, determined by the Department not to have significant effect on the environment and, therefore, not requiring preparation of an EIS.

III. APPLICABILITY

All actions must be examined to determine SEQRA classification, except the two types of actions described below in this section. It should be stressed that the entire set of activities constituting a project are considered an action subject to SEQRA (see Attachment 2.1.a. §15.3(e)). Conducting separate environmental reviews for each activity is not acceptable, unless it can be affirmatively stated in the determination of significance that such an approach is no less protective of the environment (see also 6 NYCRR Part 617, §617.2(ag) & §617.3(g)).

1. Exempt Actions (see Attachment 2.1.A.: §15.2(m) (see also §15.12 and 15.13 for a list of actions as defined in 15.2(m)):
   a. Law enforcement or criminal proceedings;
   b. Maintenance or repair involving no substantial changes in existing structures or facilities
(Note: Most rehabilitation projects should be classified as Type II. Refer to discussion in Part IV below (see also Attachment 2.1.A.: §15.14(37)(iv));

c. Acquisition and use of equipment to rehabilitate, maintain or repair existing structures or facilities;

d. Emergency actions immediately necessary for the preservation of life, health, property or natural resources;

e. Actions required to be made within a specific time limit set by federal law, rule or regulation or other federal requirement that renders completion of an EIS impossible;

f. Ministerial Acts, including: control of outdoor advertising, removal of junkyards and highway/railroad grade crossing eliminations ordered by the Commissioner of NYSDOT.

2. Excluded Actions (see Attachment 2.1.A: §15.2(1)):

a. "Grand fathered" Direct Actions (Grand fathering may be available through 1978 for projects that are undertaken by a local agency or permitted by the state. Refer questions on these matters to the Office of Legal Affairs.) that were undertaken, funded or approved before September 1, 1976 where NYSDEC has not required an EIS and no modifications are proposed that may result in a significant adverse effect on the environment;

b. Construction of a major utility transmission facility (certain electric or fuel gas transmission lines) where the Public Service Commission requires environmental review as part of issuing a certificate of environmental compatibility and public need under Article VII of the Public Service Law;

c. Actions subject to the jurisdiction of the Adirondack Park Agency pursuant to §809 of the Executive Law.

IV. PROCEDURES

STEP 1. Determine if the action is subject to review under SEQRA

1. The action must be a Direct Action or one that the Department permits or funds. Direct Actions (see definition), funding and permitting by the Department are subject to SEQRA review. Actions are projects or physical activities that result in the creation, alteration or new use of structures or land. Conducting preliminary planning and budgetary activity or environmental, engineering, feasibility and other studies necessary to form a proposal for action are not subject to SEQRA review as long as these activities do not commit the Department to start, engage in, fund or approve the action (6 NYCRR §617.5(c)(18)).

2. The action must be a discretionary decision. All discretionary decisions of an agency to directly undertake, permit or fund an action or an essential part of an action that may affect the
environment are subject to SEQRA review, unless the action is excluded or exempt. A
decision to construct a new highway or substantially change an existing highway is an example
of a discretionary decision. Discretionary decisions involve project choices to be made by the
decision makers.

3. If the action is a Type II, exempt or excluded, no further review is required under SEQRA.
For a discussion of exempt and excluded actions, see Section III, Applicability, above. It
should be noted that projects in or substantially contiguous to a Critical Environmental Area
(CEA), as defined in Attachment 2.1.A.: §15.2(f), are presumed to be Non-Type II Actions
unless there is clearly only minor alteration of or adverse effect upon such CEA (see
Attachment 2.1.A.:§15.14(7)(x); see also 6 NYCRR Part 617.2(I) & .14(g)).

Type II:

If the action is a Direct Action of the Department, determine whether the action is on the
Department Type II list (Attachment 2.1.A.: §15.14; see also Attachment 2.1.B. for the Type
II list and a discussion of when to classify a project and how to determine Type II classification
using the CAPER 1 computer program).

If the action is Type II, no further SEQRA review is required. Do sufficient documenting of the
Type II classification as required by Chapter 2 and Appendix B of the Design Procedure
Manual. For instance, documentation should clearly illustrate how the action is consistent with
a particular Type II action listed in §15.14(e). In addition, how the action does not exceed
applicable §15.14(d) thresholds should be clearly stated.

Prudent judgement must be applied in determining if the applicable §15.14(d) thresholds are
exceeded on any given project. To decide whether there is a more than minor or significant
effect, consideration must be given to the effect's magnitude or severity and the importance or
relation to its setting. Generally, the larger the impact, the more likely more in-depth analysis
would be required. However, a small impact on a resource that is not that large to begin with
or that may be highly valued by the local community may also warrant additional review.

If the action will be funded or permitted by the Department, determine whether the action is on
the Department Type II list or on the Type II list of the applicant agency. The applicant for
such projects shall submit sufficient information for the Department to make the Type II
determination. The Region should keep documentation of the Type II determination in the
project files.

If the Department is not the lead agency, it will be notified of the determination of the lead
agency that the project is Type II, non-Type II (Type I or unlisted under 6 NYCRR Part 617),
exempt or excluded. In such a case, upon review and concurrence of submitted determination,
the Department may fund, permit or undertake action with respect to the action and no further

2.1-6
SEQRA review is required (See also discussion of Involved Agency Responsibilities below).

If an action is excluded, exempt or Type II, there is no further review required under SEQRA. (Note: Although SEQRA does not require any further reviews, Department policy may require additional reviews, such as Design Quality Assurance Bureau reviews and Structures Division technical reviews.) However, a memo to the file should be prepared which clearly shows how the action meets the definition of a particular listed Type II action, as set forth in § 15.14(e), and does not exceed applicable §15.14(d) thresholds. The Department's decision relative to Type II actions should be reflected in the Expanded Project Proposal, Scope Summary Memorandum and/or Design Approval Document.

STEP 2. **Determine the Lead Agency** (see Attachment 2.1.A.: §15.5)

The lead agency decision should be made during the project scoping stage. The Department is the lead agency:

1. In Direct Actions;

2. Where the Department is funding the action and the action is a capital construction project for which the Department will prepare or directly supervise preparation of the project design (unless the applicant is an agency that asks to be the lead agency and the Department agrees);

3. Where the Department is asked to fund or permit an action of an applicant that is not an agency subject to SEQRA and where no other agencies are involved.

The Department is **not** the lead agency where:

1. There is an agency applicant, the Department is asked to fund or permit the action and the action is not a capital construction project for which the Department will prepare or directly supervise project design preparation (the lead agency will be the applicant or any other agency as agreed by the applicant and such other agency);

2. There are other agencies involved with greater responsibility for the proposed action and the Department is asked to construct, design, fund or approve non-essential transportation facilities or structures that are supplementary to the proposed non-transportation action;

3. There are other agencies involved with greater responsibility for the proposed action and the Department is asked to permit a proposed non-transportation action.

In unusual cases, the Department may agree to be lead agency even if the preceding factors apply. If such an unusual cases arises, please contact the Environmental Analysis Bureau and/or the Office of Legal Affairs for advice.
It is also possible for the Department to act as a co-lead agency. If you feel a co-lead agency situation is advisable, please contact the Environmental Analysis Bureau for advice.

**Involved Agency Responsibilities**

The Department is an involved agency under SEQRA when funding, approving or issuing a permit for a project and such funding, approval or permit issuance is an essential part of the project. (see Appendix A of the Department's Manual of Administrative Procedures Code No. 7.12-2, dated 10/12/93 for guidance on when SEQRA processing is required) As an involved agency the Department has responsibility for providing the lead agency with comments on the SEQRA documents produced in the SEQRA process (see Attachment 2.1.A.: §15.6(b) and §15.7(b)). see also 6 NYCRR Part 617 § 617.3(e)). It is the policy of the Department not to issue a highway work permit until all the SEQRA requirements are met. (Policy for Entrance to State Highways, Section 2.2.3 - SEQRA Coordination) The Department's "An Informational Guide to the Highway Work Permit Process", which includes the Policy for Entrance to State Highways, encourages applicants to contact the Department as soon as the local government begins the SEQRA process.

The Department's involved agency input or comments should be closely related to its highway design, traffic and safety expertise and related environmental impact experience and obligations (For additional discussion about utilizing the involved agency role, particularly with respect to arterial access management, see "The Toolbag of Techniques For NYS Arterial Management - 1997 Summary" prepared by the Corridor Management Group; see also policy for Entrance to State Highways, Section 2.2.4 - Arterial/Access Management Initiative). In addition, there are certain situations where, as an involved agency, the Department is required to conduct or cause to have conducted certain environmental impact analysis.

First, it is the policy of the Department not to knowingly progress, approve, permit, fund or adopt any project that causes or further exacerbates a violation of ambient air quality standards. If the Department is asked to fund or permit a project, a review of the environmental documentation to ascertain the appropriateness of the air quality assessment should be conducted. For further guidance on this policy see EPM Chapter 1A - Air Quality: Sections 8 & 19. Second, Section 14.09 of the Parks, Recreation and Historic Preservation Law requires consultation with the State Historic Preservation Office (SHPO) prior to an action of approval, if it appears that any aspect of the project may beneficially or adversely impact any historic, architectural, archeological or cultural property on or eligible for listing on the National Register of Historic Places. Applicants to the Department should be asked to perform appropriate analysis and coordinate with SHPO accordingly.

In a coordinated review process where the lead agency has exercised due diligence in identifying the Department as an involved agency and issued a Negative Declaration, the Department having utilized the opportunity to make sure its interest are appropriately represented, can rely on that determination in making a decision to permit, approve or fund (see Attachment 2.1.A.: §15.8(a); see also 6 NYCRR Part 617.6(b)(iii)). Where the lead agency has prepared an EIS, the Department must issue a findings
statement prior to funding, approving or permitting a project (see Step 14 - SEQRA Record of
Decision for findings statement contents).

STEP 3. Compliance with Coastal Policies and Regulations (see Attachment 2.1.A.: §15.6)

If an action is Non-Type II and within a coastal area, the Department must comply with the procedures
of the New York Department of State (DOS) Coastal Zone Regulations, 19 NYCRR 600. Any FEIS
for an action in the coastal zone must include a statement that it is consistent with 19 NYCRR Part 600.
Even if the action is determined not to have a significant effect (a Negative Declaration under Step 5), a
certification that the action will not substantially hinder the coastal policies in Part 600 must be included
in the Negative Declaration and filed with the DOS. (See also EPM Chapter 4.2. - Coastal
Management)

STEP 4. Determination of Significance

The determination of significance is a critical step in the SEQRA process where the Department
decides whether an EIS must be prepared. The tentative determination of significance is first made
during the scoping stage of project development to enable the project developer to estimate project
cost, scope and schedule. Such a determination of significance is confirmed in Design Phase I (see

The Department must consider severity of the environmental impacts and their importance in relation to
the setting. The information compiled in the environmental assessment should be reviewed to determine
whether the action may have a significant effect on the environment.

1. Prepare Environmental Assessment

The Department shall prepare an environmental assessment on proposed Direct Actions that are not
Type II, exempt or excluded. Such an assessment will form the basis for making the determination of
significance. The Design Procedure Manual provides guidance on how to develop Design
Reports/Environmental Assessments (see Appendix B of the Design Procedure Manual). If the action
is not a Direct Action, the applicant can be requested to complete a Full Environmental Assessment
Form (EAF) (see Attachments 2.1.D. and 2.1.E.). An environmental assessment is not required
if the Department chooses to go directly to a DEIS; however, it may be useful to prepare an
environmental assessment even if the action is likely to be the subject of a DEIS. If the Department
decides a DEIS will be prepared, go to Step 8.

It should be noted that use of the attached EAF's is not mandatory. Agencies may create their own
assessments provided they are at least as comprehensive as the forms and include an evaluation of the
known or potential environmental impacts.

2.1-9
2. Determine Significance

a. Factors to consider in determining significance are listed in Attachment 2.1.A.: §15.11(a).

b. The entire set of activities that constitute the project is one action for the purposes of SEQRA review. The whole action must be considered in determining significance, including all known phases of the action. If separate phases of an action will be treated independently, a generic EIS must be prepared. Generic EIS's can deal with phases or sequenced actions. Generic EIS's must include not only the site-specific actions but an analysis of subsequent phases' cumulative effects on the environment and existing natural resource base. You should consult with EAB if you think a generic EIS is required.

c. Reasonably related short-term (immediate), long-term and cumulative impacts must be considered. It is usually not necessary to consider cumulative impacts of unrelated actions when making the determination of significance. Cumulative impacts occur when actions are reasonably expected to take place in a way that their combined probable effects may be significant. If you think that cumulative effects are of concern in a particular action, you may wish to consult with the Office of Legal Affairs as well as EAB. Cumulative effects need to be considered in determining significance if two or more simultaneous or subsequent actions are:

i) included in any long-range plan of which the action under consideration is a part (For example, if a community formally adopted a master plan or comprehensive plan that projected a need for certain transportation projects and other not necessarily related projects, the Department, in assessing the environmental impacts of the transportation projects, must also consider potential impacts associated with such other not necessarily related projects discussed in the master or comprehensive plan.);

ii) likely to be undertaken as a result of the proposed action. For instance, if, as a result of a transportation project, additional projects or development is likely, the Department must assess the potential impacts of such additional projects or development as part of its review of the transportation project;

iii) dependent on one another and one action cannot or will not proceed unless the other action is taken. (Consideration of these cumulative impacts is only necessary to the extent to which they are consistent with the definitions set forth in a. and/or b. above.);

d. Significance of an impact should be assessed in connection with its setting (e.g. urban or
rural), probability of occurrence, duration, irreversibility, geographic scope, magnitude and the number of people it may affect.

If an action's impact on the environment is not considered significant, **after an environmental assessment is prepared**, a Negative Declaration can be prepared (Step 5). If an action's impact on the environment may be significant, a Positive Declaration must be prepared (Step 6).

**STEP 5. **Negative Declaration

If the Department determines, based on consideration of a completed environmental assessment (i.e., FDR/EA or FDR (see Design Procedure Manual, Appendix B for format and content)), comments received and transcript of any public hearing (i.e., EDPL or federal-aid), that the action will not have significant environmental effects, it will prepare a Negative Declaration (see Attachment 2.1.A.: §15.6(b) and §15.7(b)).

1. **Negative Declaration Contents**

A Negative Declaration or Determination of No Significant Effect is the decision that an action will not result in a significant environmental impact and, consequently, no EIS will be prepared. The determination is based on facts known at the time and cannot depend on the outcome of future studies. **(In the Department, this notice is filed in Design Phase IV just prior to requesting design approval [see the appropriate section of Part II, Steps of the Design Procedure Manual]).** The Notice of a Negative Declaration shall contain the following:

- A statement that it is a Negative Declaration for the purposes of Article 8 of the Environmental Conservation Law;
- A statement that the Department (as lead agency) has determined that the action will not have a significant effect on the environment;
- The name, address and telephone number of the Department employee who can provide further information;
- A brief description of the nature, extent and location of the action;
- A statement of the reasons that support the determination (**NOTE:** This statement should be a reasoned elaboration of the facts and circumstances supporting the Negative Declaration. It should identify all the relevant areas of environmental concern and succinctly show, based on the environmental assessment, why the impact, if any, is not significant);
- Where applicable, a determination of consistency with the Department of State Local
Waterfront Revitalization Plan policies.

2. Conditioned Negative Declaration

The Conditioned Negative Declaration (CND), not generally issued by the Department, is only available for non-ministerial and non-type II actions that the Department is funding or permitting. An agency may not use a CND for Direct Actions. The Department may choose to make a CND where the action may have potentially significant environmental effects that can be eliminated or adequately mitigated by conditions. CND's have the following requirements in addition to those listed above in Section A (see 6 NYCRR §617(d)):

• Must be for projects which do not exceed NYSDEC Type I thresholds (see Attachment 2.1.G.);

• Must use coordinated review procedures with other agencies, as described in NYSDEC SEQRA Regulations, 6 NYCRR §617.6(b)(3);

• Must use Full EAF;

• Must publish the CND in the NYSDEC's Environmental Bulletin for a minimum 30-day comment period;

• Must explicitly state mitigation measures CND.

STEP 6. Positive Declaration (see Attachment 2.1.A.: §15.6© and 15.7(c))

1. Positive Declaration Contents (see Attachment 2.1.A.: §15.10(b))

The Department shall prepare a formal declaration that the action may result in significant environmental impacts, known as a Positive Declaration NEPA process. Such a positive declaration can be made as early as in Design Phase I (see the Design Procedure Manual, Part II Steps, for timing and Appendix D for a sample notice). These actions will require the preparation of an EIS. The Notice of a Positive Declaration must contain the following:

• A statement that it is a Positive Declaration for the purposes of Article 8 of the Environmental Conservation Law;

• A statement that the Department (as lead agency) has determined that the action may have a significant effect on the environment;

• A statement that a DEIS will be prepared;
• The name, address and telephone number of the Department employee who can provide further information;

• A brief description of the nature, extent and location of the action;

• A brief description of the possible significant effects that have been identified.

2. Actions Where the NEPA Process Applies

The NEPA review process applies to actions that are federally funded or subject to federal approvals. If the Department determines that an action may have significant environmental effects and is subject to the NEPA review process, the Department shall follow procedures for compliance with NEPA that will result in the completion of a federal EIS. If another agency is the lead agency and the Department is notified that the action may have significant effects and is subject to the NEPA review process, the Department shall follow procedures for compliance with NEPA (see Attachment 2.1.A.: §15.8(b)). Completing the Federal FEIS and co-authoring a document entitled the Federal Record of Decision (see Step 14) completes the SEQRA process if the co-authored Record of Decision contains all the substantive requirements of a SEQRA Record of Decision. If a Federal Record of Decision is prepared by the Federal Agency, the Department still has to do the substantive SEQRA work. That is, the Department may adopt the Federal Record of Decision as a statement of facts and conclusions relied upon in the FEIS for the Department’s decision. However, the Department must still state its decision and make the findings required by SEQRA (See Step 14 below for a discussion of SEQRA’s findings statement requirements).

STEP 7. **Filing the Notice of Negative or Positive Declaration** (see Attachment 2.1.A: §15.10(a)(2) & (b)(2); see also 617.12(b) & (c))

Immediately upon completion, the Notice of a Negative or Positive Declaration shall be filed:

• With the NYSDOT Main Office;

• With the Commissioner of Environmental Conservation at 50 Wolf Road, Albany, NY 12233;

• In the Environmental Notice Bulletin (ENB) (Attachment 2.1.F provides a form which may be used in fulfilling this notice requirement);

• For Direct Actions, with the NYSDOT Regional office;

• For Direct Actions, with the Regional NYSDEC office;

• For Direct Actions, with the chief executive officer of all the political subdivisions in which the
action is located;

- If there is an applicant, with the applicant;

- If there are involved agencies, with the involved agencies.

Filing the Notice of Negative Declaration concludes the SEQRA process for an action.

Any subsequent notices required to be filed or published by the Department which are related to a proposed action for which the Department has filed a Negative Declaration, shall contain a statement that such an action has been the subject of such Negative Declaration (see Attachment 2.1. A.: §15.10(f)).

STEP 8. **EIS Scoping** (see Attachment 2.1.A.: §15.2(x), §15.6(c)(2) and §15.7(d))

After filing a Positive Declaration, the Department will undertake such scoping as is necessary. Scoping is the process that identifies relevant environmental effects of an action that must be addressed in a DEIS. This scoping is with respect to SEQRA. It should not be confused with the Department's Project Scoping. This is not to say, however, that pertinent EIS scoping information should not be introduced at Project Scoping, if available. Scoping is intended to narrow the issues in the EIS so the relevant areas of environmental concern are identified and fully explored. Scoping can be thought of in formal or informal terms (A scoping checklist devised by NYSDEC is included as Attachment 2.1.G.).

1. **Formal Scoping** (6 NYCRR Part 617 §617.8)

   Formal scoping results in a written scope of issues to be addressed in the EIS. If there is an applicant, the Department may ask the applicant to prepare a draft written scope of issues, but as lead agency, the Department must provide a Draft scope to involved agencies and make such a scope available to interested agencies. As Lead Agency the Department shall provide involved agencies and others who provided comment a Final Scope within 60 days of the distribution of the Draft Scope. In formal scoping, an opportunity, whether it be by public meeting or other means, for public participation must be provided. Any substantive information obtained during scoping, not included in the DEIS should be considered public comment on the DEIS.

2. **Informal Scoping**

   Informal scoping is based on informal comments from the applicant and any involved agencies. There is no separate written document. Comments are merely incorporated into the draft EIS.

The Department has the option of whether to utilize formal or informal scoping. Criteria to consider might include, but are not limited to: (1) degree of public interest, (2) number of and
role of involved agencies and (3) degree of project complexity.

STEP 9. Preparation and Review of a Draft EIS

Based on Regional Office input and Main Office advisory input, as appropriate, the Region will prepare or supervise the preparation of the draft EIS (DEIS).

1. DEIS Content

The DEIS should contain all information necessary to make decisions involving environmental concerns for the proposed action. The DEIS also allows public review and comment on the environmental effects of a proposed action. The Department will prepare the DEIS for Direct Actions. Where another agency is the lead agency, the Department will comment on the DEIS. If there is an applicant and the Department will prepare or supervise design of the project, the Department will prepare the DEIS unless the applicant wants to and the Department agrees. In all other cases, the applicant will be notified to prepare the DEIS in accordance with Department procedures (see Attachment 2.1.A.: §15.15 for a list of DEIS and FEIS contents; see also the Design Procedure Manual, Appendix B (Format and Content of Design Approval Documents)).

2. Review of Draft EIS

After preparing the Design Report/DEIS (see the Design Procedure Manual, "Procedural Steps," Non-Type II (EIS), Phase I), the DR/DEIS is distributed to the Regional reviewers and for advisory reviews, the Design Quality Assurance Bureau and Main Office reviewers, as appropriate (see Design Procedure Manual, Part II - Steps and Appendix I for instructions regarding Main Office reviews). If the DEIS is prepared for a project that the Department is permitting and/or funding, the applicant must be notified when the DEIS is accepted by the Department.

STEP 10. Notice of Completion of the DEIS: Contents and Filing (see Attachment 2.1.A.: §15.10(c))

After completing internal review of the DEIS, the Department files a Notice of Completion of the DEIS, allowing for a minimum comment period of 30 days (see Attachment 2.1.A.: §15.6(d)(3) and §15.7(f)(3); see also Design Procedure Manual, Appendix D, for a sample notice).

1. The Notice of Completion of the DEIS must contain the following:

   • A statement that it is a Notice of Completion of a DEIS;
   • A statement that NYSDOT is the lead agency;
The name, address and telephone number of the NYSDOT employee who can provide further information;

A brief description of the nature, extent and location of the action;

A brief description of the possible significant effects that have been identified in the DEIS;

A statement indicating where and how copies of the DEIS may be obtained from the Department;

A statement that comments on the DEIS are requested and will be received and considered by the Department for not less than 30 days from the date of filing of the notice or not less than 10 days from the close of any hearing held to consider the DEIS, which ever is last;

The address to which comments should be sent.

2. The Notice of Completion of the DEIS, together with a copy of the DEIS, shall be filed (see Attachment 2.1.A.: §15.10(c)(2); see also 6 NYCRR Part 617 §617.12(b)(c)):

With the Environmental Analysis Bureau on all projects and the Design Quality Assurance Bureau on federal-aid projects;

With the Commissioner of the Department of Environmental Conservation at 50 Wolf Road, Albany, NY 12233;

In the ENB (Attachment 2.1.F provides a form which may be used in fulfilling this notice requirement) (NOTE: Business Environment Publication, Inc. need not receive a copy of the DEIS or FEIS);

For Direct Actions, with the NYSDOT Regional office;

For Direct Actions, with the Region NYSDEC office;

For Direct Actions, with the chief executive officer of all the appropriate political subdivisions in which the action is located;

If there is an applicant, with the applicant;

If there are involved agencies (local, state or federal), with the involved agencies;
• With the Secretary of State if the action is in a coastal area.

STEP 11. **Holding a SEQRA Hearing**

1. **Determination of Whether to Hold a SEQRA Public Hearing** (see Attachment 2.1.A.: §15.6(d)(2) and 15.7(f)(2)).

   Upon completion of the DEIS, the Department shall determine whether or not to hold a hearing (NOTE: Notices of Public Hearing may be combined with Notice of Completion of DEIS). Hearings are optional under SEQRA. At the discretion of the Department, it may determine that a hearing is advisable based on the degree of interest shown by other persons and the extent to which a hearing can aid in the Department decision-making process. It is presumed that whenever there is public interest identified, the Department will to the fullest extent possible address any issues or concerns raised by the public.

   **NOTE:** If a project is federal-aid, make the determination based on Federal Public Hearing requirements (see 23 CFR 771, §771.111). Also, if takings are more than de minimis, an Eminent Domain Procedures Law (EDPL) public hearing may be required, in which case the hearing should be conducted in accordance with federal-aid public hearing procedures (see discussion of the appropriate Design Phase II section of the Design Procedure Manual, Part II, Steps). The SEQRA or NEPA public hearing can create an exemption from the EDPL hearing requirement if the hearing is held on notice to owners of property which may be acquired for the project. In the case where more than de minimis amounts of property are to be acquired, the notice of hearing should be mailed to each property owner and documentation of that mailing should be maintained in the Department's project files.

2. **Contents of the Notice of SEQRA Hearing** (see Attachment 2.1.A.: §15.10(d))

   The hearing notice must be published in a newspaper of general circulation in the area of the potential impacts and effect of the proposed action a minimum of 14 days before a hearing is held. Copies of the notice of the public hearing must be sent to local, state and federal advisory agencies and individuals on the project mailing list. The Notice of Hearing shall contain the time, place and purpose of the hearing and a summary of information contained in the Notice of Completion of the DEIS.

   It shall be filed in the same manner as the Notice of Completion of the DEIS.

   **NOTE:** Notice requirements are different for EDPL or federal-aid public hearings (see Design Procedure Manual, Part II, Steps, Design Phase III).
3. **Conduct of the SEQRA Hearing**

At the meeting, the public may speak and submit written comments. There should be arrangements to keep a transcript of the oral comments. A sign-in sheet should be provided to keep a record of attendees. The record of the hearing should be kept as part of the project files. Written comments must be accepted for 10 days following the close of the hearing.

For further information on public hearing requirements, see the Design Procedure Manual, Part II, Steps, Design Phase III, Appendix D and Appendix E.

After consideration of the DEIS, comments received and transcript of any public hearing, the Department uses this information to prepare a DR/FEIS.

**STEP 12. Preparation and Review of Final Environmental Impact Statement**

The Region will prepare or supervise the preparation of the Final Environmental Impact Statement (FEIS). There is no specific time limit in which the Department must prepare a FEIS incorporating comments and changes from the DEIS; however, the FEIS should be prepared as promptly as possible. All substantive or relevant comments received on the DEIS should be answered in the FEIS (see Attachment 2.1.A.: §15.15; see also the Design Procedure Manual, Appendix B ("Formal and Content of Design Approval Documents")). After internal review by Regional and Main Office reviewers, the Region resolves comments and revises the FEIS. When the Region determines that comments have been satisfactorily resolved, it notifies the applicant if there is one and publishes a Notice of Completion of the FEIS.

**STEP 13. Notice of Completion of the FEIS; Contents and Filing (see Attachment 2.1.A.: §15.10(e); see also 617.12(b) & (c))**

After completing internal review of the FEIS, the Department publishes a Notice of Completion of the FEIS.

1. The Notice of Completion of the FEIS must contain the following:

   • A statement that it is a Notice of Completion of an FEIS;

   • A statement that NYSDOT is the lead agency;

   • A brief description of the nature, extent and location of the action;

   • A statement indicating where and how copies of the FEIS may be obtained from the Department;
• A statement that comments on the FEIS are requested and will be received and considered by the Department for not less than 10 days from the date of filing of the notice;

• The address to which comments should be sent.

2. The Notice of Completion of the FEIS, together with a copy of the FEIS, shall be filed for a minimum 10-day period with the following (see Attachment 2.1.A.: §15.6(g), §15.7(l) and §15.10(e));

• With the Environmental Analysis Bureau for all projects and the Design Quality Assurance Bureau for federal-aid projects;

• With the Commissioner of the Department of Environmental Conservation at 50 Wolf Road, Albany, NY 12233;

• In the ENB (Attachment 2.1.E. provides a form which may be used in fulfilling this notice requirement) (NOTE: Business Government Publications, Inc. need not receive the FEIS);

• For Direct Actions, with the NYSDOT Regional office;

• For Direct Actions, with the Region NYSDEC office;

• For Direct Actions, with the chief executive officer of all the political subdivisions in which the action is located;

• If there is an applicant, with the applicant;

• If there are involved agencies (local, state of federal), with the involved agencies;

• With the Secretary of State if the action is in a coastal area.

**STEP 14. SEQR A Record of Decision (see Attachment 2.1.A.: §15.9)**

The Department will prepare a Record of Decision for Direct Actions or actions that the Department will permit or fund, where the action has been the subject of a FEIS or a federal FEIS. The Department may adopt the federal Record of Decision if the action was the subject of a federal FEIS and the Department jointly prepared the Record of Decision pursuant to 40 CFR 1505.2 (effective July 30, 1979).

1. The Record of Decision of the Department shall articulate such decision and include the following:
A findings statement indicating the following:

1. That the requirements of Environmental Conservation Law §8-0109 have been met;

2. That, consistent with social, economic and other essential considerations, from among the reasonable alternatives thereto, the action is one that minimizes or avoids adverse environmental effects to the maximum extent practicable, including the effects disclosed in the EIS;

3. That, consistent with social, economic and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the EIS process will be minimized or avoided by incorporating as conditions to the decision those mitigative measures that were identified as practicable;

4. That, if the action is in a coastal area, the action is consistent with 19 NYCRR 600.5 or, if in an approved Local Waterfront Revitalization Program area, consistent with those policies;

A statement of the facts and conclusions relied upon in the FEIS supporting its decision and indicating the social and other economic factors that formed the basis for the decision.

In addition to the required legal findings, the Record of Decision should discuss all mitigation measures that formed the basis for the decision to proceed with the project. Listing all required mitigation in the Record of Decision will assist subsequent tracking of mitigation commitments.

A copy of the Record of Decision shall be maintained by the Region in the project files and sent to all involved agencies and, where appropriate, to the applicant. In addition, copies should be sent to the Environmental Analysis Bureau and the Design Quality Assurance Bureau in the Main Office, appropriate FHWA liaison (in most cases this will be the Design Quality Assurance Bureau (see Design Procedure Manual, Introduction, pages IV-V)).

STEP 15. **Further Review Based on Project Changes: SEIS (6 NYCRR Part 617.9(a)(7))**

At any point in project design where project changes are proposed, the SEQRA classification should be reviewed with the Regional Environmental Contact to assure that no project changes have occurred that would require review of the SEQRA classification or the FEIS. A Supplemental EIS (SEIS) must be prepared where project changes or a change in circumstances may result in significant adverse environmental effects or new information arises about significant adverse effects that was not previously addressed. An SEIS may also be required for project-specific analysis following a generic EIS. If an SEIS is required, the Region must file a Notice of Intent to Prepare an FSEIS and publish it in the same way as a Notice of Completion of an FEIS. You may wish to consult
with the Environmental Analysis Bureau if you think an SEIS may be required.

Any change in project’s classification should be documented by a memo to the file from the decision maker and in the Design Approval Document as appropriate.

**STEP 16. When an Action May be Undertaken** (see Attachment 2.1.A.: §15.3(c), §15.6(h) and §15.7(j))

The Department may not make a final decision (i.e., design approval) or commitment (i.e., detailed design, right-of-way acquisition, letting or starting construction) until the SEQRA process is finished. If an action requires an FEIS or is the subject of a federal EIS, the Department shall not commit itself to directly undertake the action, enter into any binding agreement or contract to fund the action or grant or commit itself to grant a permit for the action until the Record of Decision is prepared.

At the conclusion of the comment period on the FEIS or federal FEIS, the Department may undertake, fund or permit the action if it has given consideration to the FEIS or federal FEIS and prepared the Record of Decision.

**V. CITATIONS**

The following state and federal laws and regulations are used as a source for this guidance. Copies of the laws and regulations are maintained by the Regional Environmental Contact.

**STATE STATUTES**

Environmental Conservation Law §8-0101 to 8-0117 - The State Environmental Quality Review Act (SEQRA)

**STATE REGULATIONS**

17 NYCRR Part 15 - Procedures for the Implementation of State Environmental Quality Review Act (NYSDOT)

6 NYCRR Part 617 - State Environmental Quality Review Regulations (NYSDEC)

**STATE GUIDANCE**


**RELATED FEDERAL STATUTE/REGULATIONS**
VI. ADDITIONAL INFORMATION

This Project Environmental Guideline was prepared by Thomas G. Benware. For further information, contact the Cultural Resources/Socio-Economic/Process Section of the Environmental Analysis Bureau, Building 5, Room 303, 1220 Washington Avenue, Albany, New York 12232-0473; telephone (518) 457-9608.

VII. ATTACHMENTS

2.1.A. 17 NYCRR Part 15 - Procedures for Implementation of State Environmental Quality Review Act

2.1.B. Type II List and Method to Determine Type II Classification

2.1.C. NYSDEC List of Type I Actions

2.1.D. Full Environmental Assessment Form (EAF)

2.1.E. Short Environmental Assessment Form (EAF)

2.1.F. Environmental Notice Bulletin - Publication Form

2.1.G. NYSDEC Scoping List
Native American Graves Protection and Repatriation Act
AS AMENDED

This Act became law on November 16, 1990 (Public Law 101-601; 25 U.S.C. 3001 et seq.) and has been amended twice. This description of the Act, as amended, tracks the language of the United States Code except that (following common usage) we refer to the “Act” (meaning the Act, as amended) rather than to the “subchapter” or the “title” of the Code.

25 U.S.C. 3001, Definitions

Section 2
For purposes of this Act, the term—

(1) “burial site” means any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited.

(2) “cultural affiliation” means that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.

(3) “cultural items” means human remains and—

(A) “associated funerary objects” which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects.

(B) “unassociated funerary objects” which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe,
(C) “sacred objects” which shall mean specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents, and

(D) “cultural patrimony” which shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.

(4) “Federal agency” means any department, agency, or instrumentality of the United States. Such term does not include the Smithsonian Institution.

(5) “Federal lands” means any land other than tribal lands which are controlled or owned by the United States, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971 [43 U.S.C. 1601 et seq.].

(6) “Hui Malama I Na Kupuna O Hawai‘i Nei” means the nonprofit, Native Hawaiian organization incorporated under the laws of the State of Hawaii by that name on April 17, 1989, for the purpose of providing guidance and expertise in decisions dealing with Native Hawaiian cultural issues, particularly burial issues.

(7) “Indian tribe” means any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act) [43 U.S.C. 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.
(8) “museum” means any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items. Such term does not include the Smithsonian Institution or any other Federal agency.

(9) “Native American” means of, or relating to, a tribe, people, or culture that is indigenous to the United States.

(10) “Native Hawaiian” means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

(11) “Native Hawaiian organization” means any organization which—

(A) serves and represents the interests of Native Hawaiians,

(B) has as a primary and stated purpose the provision of services to Native Hawaiians, and

(C) has expertise in Native Hawaiian Affairs, and

shall include the Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai‘i Nei.

(12) “Office of Hawaiian Affairs” means the Office of Hawaiian Affairs established by the constitution of the State of Hawaii.

(13) “right of possession” means possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American unassociated funerary object, sacred object or object of cultural patrimony from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object, unless the phrase so defined would, as applied in section 7(c) of this Act [25 U.S.C. 3005(c)], result in a Fifth Amendment taking by the United States as determined by the United States Court of Federal Claims pursuant to
28 U.S.C. 1491 in which event the “right of possession” shall be as provided under otherwise applicable property law. The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains.

(14) “Secretary” means the Secretary of the Interior.

(15) “tribal land” means—

(A) all lands within the exterior boundaries of any Indian reservation;

(B) all dependent Indian communities;

(C) any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920 [42 Stat. 108], and section 4 of Public Law 86-3 [note preceding 48 U.S.C. 491].

Section 3

(a) The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990, shall be (with priority given in the order listed)—

(1) in the case of Native American human remains and associated funerary objects, in the lineal descendants of the Native American; or

(2) in any case in which such lineal descendants cannot be ascertained, and in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony—

(A) in the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered;

(B) in the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects; or
(C) if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe—

(1) [sic] in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects, or

(2) [sic] if it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains or objects than the tribe or organization specified in paragraph (1), in the Indian tribe that has the strongest demonstrated relationship, if upon notice, such tribe states a claim for such remains or objects.

(b) Native American cultural items not claimed under subsection (a) of this section shall be disposed of in accordance with regulations promulgated by the Secretary in consultation with the review committee established under section 8 of this Act [25 U.S.C. 3006], Native American groups, representatives of museums and the scientific community.

(c) The intentional removal from or excavation of Native American cultural items from Federal or tribal lands for purposes of discovery, study, or removal of such items is permitted only if—

(1) such items are excavated or removed pursuant to a permit issued under section 4 of the Archaeological Resources Protection Act of 1979, as amended, [16 U.S.C. 470cc] which shall be consistent with this Act;

(2) such items are excavated or removed after consultation with or, in the case of tribal lands, consent of the appropriate (if any) Indian tribe or Native Hawaiian organization;

(3) the ownership and right of control of the disposition of such items shall be as provided in subsections (a) and (b) of this section; and

(4) proof of consultation or consent under paragraph (2) is shown.
(d)(1) Any person who knows, or has reason to know, that such person has discovered Native American cultural items on Federal or tribal lands after November 16, 1990, shall notify, in writing, the Secretary of the Department, or head of any other agency or instrumentality of the United States, having primary management authority with respect to Federal lands and the appropriate Indian tribe or Native Hawaiian organization with respect to tribal lands, if known or readily ascertainable, and, in the case of lands that have been selected by an Alaska Native Corporation or group organized pursuant to the Alaska Native Claims Settlement Act of 1971 [43 U.S.C. 1601 et seq.], the appropriate corporation or group. If the discovery occurred in connection with an activity, including (but not limited to) construction, mining, logging, and agriculture, the person shall cease the activity in the area of the discovery, make a reasonable effort to protect the items discovered before resuming such activity, and provide notice under this subsection. Following the notification under this subsection, and upon certification by the Secretary of the department or the head of any agency or instrumentality of the United States or the appropriate Indian tribe or Native Hawaiian organization that notification has been received, the activity may resume after 30 days of such certification.

(2) The disposition of and control over any cultural items excavated or removed under this subsection shall be determined as provided for in this section.

(3) If the Secretary of the Interior consents, the responsibilities (in whole or in part) under paragraphs (1) and (2) of the Secretary of any department (other than the Department of the Interior) or the head of any other agency or instrumentality may be delegated to the Secretary with respect to any land managed by such other Secretary or agency head.

(e) Nothing in this section shall prevent the governing body of an Indian tribe or Native Hawaiian organization from expressly relinquishing control over any Native American human remains, or title to or control over any funerary object, or sacred object.
Section 4

(a) Chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following new section:

Section 1170

“(a) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit, the human remains of a Native American without the right of possession to those remains as provided in the Native American Graves Protection and Repatriation Act shall be fined in accordance with this title, or imprisoned not more than 12 months, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, or imprisoned not more than 5 years, or both.”

“(b) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit any Native American cultural items obtained in violation of the Native American Grave Protection and Repatriation Act shall be fined in accordance with this title, imprisoned not more than one year, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, imprisoned not more than 5 years, or both.”

(b) The table of contents for chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following new item:

“1170, Illegal Trafficking in Native American Human Remains and Cultural Items.”

Section 5

(a) Each Federal agency and each museum which has possession or control over holdings or collections of Native American human remains and associated funerary objects shall compile an inventory of such items and, to the extent possible based on information possessed by such museum or Federal agency, identify the geographical and cultural affiliation of such item.

(b)(1) The inventories and identifications required under subsection (a) of this section shall be—
Native American Graves Protection and Repatriation Act

(A) completed in consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders;

(B) completed by not later than the date that is 5 years after November 16, 1990, [the date of enactment of this Act], and

(C) made available both during the time they are being conducted and afterward to a review committee established under section 8 of this Act [25 U.S.C. 3006].

(2) Upon request by an Indian tribe or Native Hawaiian organization which receives or should have received notice, a museum or Federal agency shall supply additional available documentation to supplement the information required by subsection (a) of this section. The term “documentation” means a summary of existing museum or Federal agency records, including inventories or catalogues, relevant studies, or other pertinent data for the limited purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American human remains and associated funerary objects subject to this section. Such term does not mean, and this Act shall not be construed to be an authorization for, the initiation of new scientific studies of such remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects.

(c) Any museum which has made a good faith effort to carry out an inventory and identification under this section, but which has been unable to complete the process, may appeal to the Secretary for an extension of the time requirements set forth in subsection (b)(1)(B) of this section. The Secretary may extend such time requirements for any such museum upon a finding of good faith effort. An indication of good faith shall include the development of a plan to carry out the inventory and identification process.

(d)(1) If the cultural affiliation of any particular Native American human remains or associated funerary objects is determined pursuant to this section, the Federal agency or museum concerned shall, not later than 6 months after the completion of the inventory, notify the affected Indian tribes or Native Hawaiian organizations.
(2) The notice required by paragraph (1) shall include information—

(A) which identifies each Native American human remains or associated funerary objects and the circumstances surrounding its acquisition;

(B) which lists the human remains or associated funerary objects that are clearly identifiable as to tribal origin; and

(C) which lists the Native American human remains and associated funerary objects that are not clearly identifiable as being culturally affiliated with that Indian tribe or Native Hawaiian organization, but which, given the totality of circumstances surrounding acquisition of the remains or objects, are determined by a reasonable belief to be remains or objects culturally affiliated with the Indian tribe or Native Hawaiian organization.

(3) A copy of each notice provided under paragraph (1) shall be sent to the Secretary who shall publish each notice in the Federal Register.

(e) For the purposes of this section, the term “inventory” means a simple itemized list that summarizes the information called for by this section.

Section 6

(a) Each Federal agency or museum which has possession or control over holdings or collections of Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony shall provide a written summary of such objects based upon available information held by such agency or museum. The summary shall describe the scope of the collection, kinds of objects included, reference to geographical location, means and period of acquisition and cultural affiliation, where readily ascertainable.

(b)(1) The summary required under subsection (a) of this section shall be—

(A) in lieu of an object-by-object inventory;

(B) followed by consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders; and
Native American Graves Protection and Repatriation Act

(C) completed by not later than the date that is 3 years after November 16, 1990, [the date of enactment of this Act].

(2) Upon request, Indian Tribes and Native Hawaiian organizations shall have access to records, catalogues, relevant studies or other pertinent data for the limited purposes of determining the geographic origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American objects subject to this section. Such information shall be provided in a reasonable manner to be agreed upon by all parties.

Section 7

(a)(1) If, pursuant to section 5 of this Act [25 U.S.C. 3003], the cultural affiliation of Native American human remains and associated funerary objects with a particular Indian tribe or Native Hawaiian organization is established, then the Federal agency or museum, upon the request of a known lineal descendant of the Native American or of the tribe or organization and pursuant to subsections (b) and (e) of this section, shall expeditiously return such remains and associated funerary objects.

(2) If, pursuant to section 6 of this Act [25 U.S.C. 3004], the cultural affiliation with a particular Indian tribe or Native Hawaiian organization is shown with respect to unassociated funerary objects, sacred objects or objects of cultural patrimony, then the Federal agency or museum, upon the request of the Indian tribe or Native Hawaiian organization and pursuant to subsections (b), (c) and (e) of this section, shall expeditiously return such objects.

(3) The return of cultural items covered by this Act shall be in consultation with the requesting lineal descendant or tribe or organization to determine the place and manner of delivery of such items.
(4) Where cultural affiliation of Native American human remains and funerary objects has not been established in an inventory prepared pursuant to section 5 of this Act [25 U.S.C. 3003], or the summary pursuant to section 6 of this Act [25 U.S.C. 3004], or where Native American human remains and funerary objects are not included upon any such inventory, then, upon request and pursuant to subsections (b) and (e) of this section and, in the case of unassociated funerary objects, subsection (c) of this section, such Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.

(5) Upon request and pursuant to subsections (b), (c) and (e) of this section, sacred objects and objects of cultural patrimony shall be expeditiously returned where—

(A) the requesting party is the direct lineal descendant of an individual who owned the sacred object;

(B) the requesting Indian tribe or Native Hawaiian organization can show that the object was owned or controlled by the tribe or organization; or

(C) the requesting Indian tribe or Native Hawaiian organization can show that the sacred object was owned or controlled by a member thereof, provided that in the case where a sacred object was owned by a member thereof, there are no identifiable lineal descendants of said member or the lineal descendents, upon notice, have failed to make a claim for the object under this Act.

(b) If the lineal descendant, Indian tribe, or Native Hawaiian organization requests the return of culturally affiliated Native American cultural items, the Federal agency or museum shall expeditiously return such items unless such items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States. Such items shall be returned by no later than 90 days after the date on which the scientific study is completed.
(c) If a known lineal descendant or an Indian tribe or Native Hawaiian organization requests the return of Native American unassociated funerary objects, sacred objects or objects of cultural patrimony pursuant to this Act and presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the Federal agency or museum did not have the right of possession, then such agency or museum shall return such objects unless it can overcome such inference and prove that it has a right of possession to the objects.

(d) Any Federal agency or museum shall share what information it does possess regarding the object in question with the known lineal descendant, Indian tribe, or Native Hawaiian organization to assist in making a claim under this section.

(e) Where there are multiple requests for repatriation of any cultural item and, after complying with the requirements of this Act, the Federal agency or museum cannot clearly determine which requesting party is the most appropriate claimant, the agency or museum may retain such item until the requesting parties agree upon its disposition or the dispute is otherwise resolved pursuant to the provisions of this Act or by a court of competent jurisdiction.

(f) Any museum which repatriates any item in good faith pursuant to this Act shall not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state law that are inconsistent with the provisions of this Act.

Section 8

(a) Within 120 days after November 16, 1990, the Secretary shall establish a committee to monitor and review the implementation of the inventory and identification process and repatriation activities required under sections 5, 6 and 7 of this Act [25 U.S.C. 3003, 3004, and 3005].
(b)(1) The Committee established under subsection (a) of this section shall be composed of 7 members,

(A) 3 of whom shall be appointed by the Secretary from nominations submitted by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders with at least 2 of such persons being traditional Indian religious leaders;

(B) 3 of whom shall be appointed by the Secretary from nominations submitted by national museum organizations and scientific organizations; and

(C) 1 who shall be appointed by the Secretary from a list of persons developed and consented to by all of the members appointed pursuant to subparagraphs (A) and (B).

(2) The Secretary may not appoint Federal officers or employees to the committee.

(3) In the event vacancies shall occur, such vacancies shall be filled by the Secretary in the same manner as the original appointment within 90 days of the occurrence of such vacancy.

(4) Members of the committee established under subsection (a) of this section shall serve without pay, but shall be reimbursed at a rate equal to the daily rate for GS-18 of the General Schedule for each day (including travel time) for which the member is actually engaged in committee business. Each member shall receive travel expenses, including per diem in lieu of subsistence, in accordance with sections 5702 and 5703 of title 5 [United States Code].

(c) The committee established under subsection a) of this section shall be responsible for—

(1) designating one of the members of the committee as chairman;

(2) monitoring the inventory and identification process conducted under sections 5 and 6 of this Act [25 U.S.C. 3003 and 3004] to ensure a fair, objective consideration and assessment of all available relevant information and evidence;

(3) upon the request of any affected party, reviewing and making findings related to—
Native American Graves Protection and Repatriation Act

(A) the identity or cultural affiliation of cultural items, or
(B) the return of such items;

(4) facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of such items including convening the parties to the dispute if deemed desirable;

(5) compiling an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommending specific actions for developing a process for disposition of such remains;

(6) consulting with Indian tribes and Native Hawaiian organizations and museums on matters within the scope of the work of the committee affecting such tribes or organizations;

(7) consulting with the Secretary in the development of regulations to carry out this Act;

(8) performing such other related functions as the Secretary may assign to the committee; and

(9) making recommendations, if appropriate, regarding future care of cultural items which are to be repatriated.

25 U.S.C. 3006(d), Admissibility of records
(d) Any records and findings made by the review committee pursuant to this Act relating to the identity or cultural affiliation of any cultural items and the return of such items may be admissible in any action brought under section 15 of this Act [25 U.S.C. 3013].

25 U.S.C. 3006(e), Recommendations and report
(e) The committee shall make the recommendations under paragraph (c)(5) of this section in consultation with Indian tribes and Native Hawaiian organizations and appropriate scientific and museum groups.

25 U.S.C. 3006(f), Committee access
(f) The Secretary shall ensure that the committee established under subsection (a) of this section and the members of the committee have reasonable access to Native American cultural items under review and to associated scientific and historical documents.
(g) The Secretary shall—

(1) establish such rules and regulations for the committee as may be necessary, and

(2) provide reasonable administrative and staff support necessary for the deliberations of the committee.

(h) The committee established under subsection (a) of this section shall submit an annual report to the Congress on the progress made, and any barriers encountered, in implementing this section during the previous year.

(i) The committee established under subsection (a) of this section shall terminate at the end of the 120-day period beginning on the day the Secretary certifies, in a report submitted to Congress, that the work of the committee has been completed.

Section 9

(a) Any museum that fails to comply with the requirements of this Act may be assessed a civil penalty by the Secretary of the Interior pursuant to procedures established by the Secretary through regulation. A penalty assessed under this subsection shall be determined on the record after opportunity for an agency hearing. Each violation under this subsection shall be a separate offense.

(b) The amount of a penalty assessed under subsection (a) of this section shall be determined under regulations promulgated pursuant to this Act, taking into account, in addition to other factors—

(1) the archaeological, historical, or commercial value of the item involved;

(2) the damages suffered, both economic and noneconomic, by an aggrieved party, and

(3) the number of violations that have occurred.
(c) If any museum fails to pay an assessment of a civil penalty pursuant to a final order of the Secretary that has been issued under subsection (a) of this section and not appealed or after a final judgment has been rendered on appeal of such order, the Attorney General may institute a civil action in an appropriate district court of the United States to collect the penalty. In such action, the validity and amount of such penalty shall not be subject to review.

(d) In hearings held pursuant to subsection (a) of this section, subpoenas may be issued for the attendance and testimony of witnesses and the production of relevant papers, books, and documents. Witnesses so summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States.

Section 10

(a) The Secretary is authorized to make grants to Indian tribes and Native Hawaiian organizations for the purpose of assisting such tribes and organizations in the repatriation of Native American cultural items.

(b) The Secretary is authorized to make grants to museums for the purpose of assisting the museums in conducting the inventories and identification required under sections 5 and 6 of this Act [25 U.S.C. 3003 and 3004].

Section 11

Nothing in this Act shall be construed to—

(1) limit the authority of any Federal agency or museum to—

(A) return or repatriate Native American cultural items to Indian tribes, Native Hawaiian organizations, or individuals, and

(B) enter into any other agreement with the consent of the culturally affiliated tribe or organization as to the disposition of, or control over, items covered by this Act;

(2) delay actions on repatriation requests that are pending on November 16, 1990;

(3) deny or otherwise affect access to any court;
(4) limit any procedural or substantive right which may otherwise be secured to individuals or Indian tribes or Native Hawaiian organizations; or

(5) limit the application of any State or Federal law pertaining to theft or stolen property.

Section 12
This Act reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government.

Section 13
The Secretary shall promulgate regulations to carry out this Act within 12 months of November 16, 1990.

Section 14
There is authorized to be appropriated such sums as may be necessary to carry out this Act.

Section 15
The United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this Act and shall have the authority to issue such orders as may be necessary to enforce the provisions of this Act.
The National Environmental Policy Act of 1969, as amended


An Act to establish a national policy for the environment, to provide for the establishment of a Council on Environmental Quality, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "National Environmental Policy Act of 1969."

Purpose

Sec. 2 [42 USC § 4321]. The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I

CONGRESSSIONAL DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

Sec. 101 [42 USC § 4331].

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consist with other essential
considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may --

1. fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
2. assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
3. attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
4. preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;
5. achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
6. enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Sec. 102 [42 USC § 4332]. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall --

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative
uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by title II of this Act.

Sec. 103 [42 USC § 4333]. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

Sec. 104 [42 USC § 4334]. Nothing in section 102 [42 USC § 4332] or 103 [42 USC § 4333] shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

Sec. 105 [42 USC § 4335]. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

TITLE II

COUNCIL ON ENVIRONMENTAL QUALITY

Sec. 201 [42 USC § 4341]. The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the "report") which shall set forth (1) the status and condition of the major natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial environment, including, but not limited to, the forest, dryland, wetland, range, urban, suburban and rural environment; (2) current and foreseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements
of the Nation; (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation in the light of expected population pressures; (4) a review of the programs and activities (including regulatory activities) of the Federal Government, the State and local governments, and nongovernmental entities or individuals with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and (5) a program for remediing the deficiencies of existing programs and activities, together with recommendations for legislation.

Sec. 202 [42 USC § 4342]. There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the "Council"). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in title I of this Act; to be conscious of and responsive to the scientific, economic, social, aesthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.

Sec. 203 [42 USC § 4343].

(a) The Council may employ such officers and employees as may be necessary to carry out its functions under this Act. In addition, the Council may employ and fix the compensation of such experts and consultants as may be necessary for the carrying out of its functions under this Act, in accordance with section 3109 of title 5, United States Code (but without regard to the last sentence thereof).

(b) Notwithstanding section 1342 of Title 31, the Council may accept and employ voluntary and uncompensated services in furtherance of the purposes of the Council.

Sec. 204 [42 USC § 4344]. It shall be the duty and function of the Council --

1. to assist and advise the President in the preparation of the Environmental Quality Report required by section 201 [42 USC § 4341] of this title;
2. to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in title I of this Act, and to compile and submit to the President studies relating to such conditions and trends;
3. to review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in title I of this Act for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;
4. to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;
5. to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;
6. to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;
7. to report at least once each year to the President on the state and condition of the environment; and
8. to make and furnish such studies, reports thereon, and recommendations with respect to matters of policy and legislation as the President may request.

Sec. 205 [42 USC § 4345]. In exercising its powers, functions, and duties under this Act, the Council shall --

1. consult with the Citizens' Advisory Committee on Environmental Quality established by Executive Order No. 11472, dated May 29, 1969, and with such representatives of science, industry, agriculture, labor, conservation organizations, State and local governments and other groups, as it deems advisable; and
2. utilize, to the fullest extent possible, the services, facilities and information (including statistical information) of public and private agencies and organizations, and individuals, in order that duplication of effort and expense may be avoided, thus assuring that the Council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.

Sec. 206 [42 USC § 4346]. Members of the Council shall serve full time and the Chairman of the Council shall be compensated at the rate provided for Level II of the Executive Schedule Pay Rates [5 USC § 5313]. The other members of the Council shall be compensated at the rate provided for Level IV of the Executive Schedule Pay Rates [5 USC § 5315].

Sec. 207 [42 USC § 4346a]. The Council may accept reimbursements from any private nonprofit organization or from any department, agency, or instrumentality of the Federal Government, any State, or local government, for the reasonable travel expenses incurred by an officer or employee of the Council in connection with his attendance at any conference, seminar, or similar meeting conducted for the benefit of the Council.

Sec. 208 [42 USC § 4346b]. The Council may make expenditures in support of its international activities, including expenditures for: (1) international travel; (2) activities in implementation of international agreements; and (3) the support of international exchange programs in the United States and in foreign countries.

Sec. 209 [42 USC § 4347]. There are authorized to be appropriated to carry out the provisions of this chapter not to exceed $300,000 for fiscal year 1970, $700,000 for fiscal
year 1971, and $1,000,000 for each fiscal year thereafter.
Public Law 89-665

AN ACT

To establish a program for the preservation of additional historic properties throughout the Nation, and for other purposes.

October 15, 1966

[80 Stat. 915]  
[Preservation program established.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

The Congress finds and declares—

(a) that the spirit and direction of the Nation are founded upon and reflected in its historic past;

(b) that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;

(c) that, in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation; and

(d) that, although the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.

TITLE I

SEC. 101. (a) The Secretary of the Interior is authorized—  

(1) to expand and maintain a national register of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, and culture, hereinafter referred to as the National Register, and to grant funds to States for the purpose of preparing comprehensive statewide historic surveys and plans, in accordance with criteria established by the Secretary, for the preservation, acquisition, and development of such properties;

(2) to establish a program of matching grants-in-aid to States for projects having as their purpose the preservation for public benefit of properties that are significant in American history, architecture, archeology, and culture; and

(3) to establish a program of matching grant-in-aid to the National Trust for Historic Preservation in the United States, chartered by act of Congress approved October 28, 1949 (63 Stat. 927), as amended, for the purpose of carrying out the responsibilities of the National Trust.

(b) As used in this Act—

(1) The term "State" includes, in addition to the several States of the Union, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(2) The term "project" means programs of State and local governments and other public bodies and private organizations and individuals for the acquisition of title or interests in, and for the develop-
(3) The term "historic preservation" includes the protection, rehabilitation, restoration, and reconstruction of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, or culture.

(4) The term "Secretary" means the Secretary of the Interior.

Sec. 102. (a) No grant may be made under this Act—

(1) unless application therefor is submitted to the Secretary in accordance with regulations and procedures prescribed by him;

(2) unless the application is in accordance with the comprehensive statewide historic preservation plan which has been approved by the Secretary after considering its relationship to the comprehensive statewide outdoor recreation plan prepared pursuant to the Land and Water Conservation Fund Act of 1965 (78 Stat. 887);

(3) for more than 50 per centum of the total cost involved, as determined by the Secretary and his determination shall be final;

(4) unless the grantee has agreed to make such reports, in such form and containing such information as the Secretary may from time to time require;

(5) unless the grantee has agreed to assume, after completion of the project, the total cost of the continued maintenance, repair, and administration of the property in a manner satisfactory to the Secretary; and

(6) until the grantee has complied with such further terms and conditions as the Secretary may deem necessary or advisable.

(b) The Secretary may in his discretion waive the requirements of subsection (a), paragraphs (3) and (5) of this section for any grant under this Act to the National Trust for Historic Preservation in the United States, in which case a grant to the National Trust may include funds for the maintenance, repair, and administration of the property in a manner satisfactory to the Secretary.

(c) No State shall be permitted to utilize the value of real property obtained before the date of approval of this Act in meeting the remaining cost of a project for which a grant is made under this Act.

Sec. 103. (a) The amounts appropriated and made available for grants to the States for comprehensive statewide historic surveys and plans under this Act shall be apportioned among the States by the Secretary on the basis of needs as determined by him; Provided, however, That the amount granted to any one State shall not exceed 50 per centum of the total cost of the comprehensive statewide historic survey and plan for that State, as determined by the Secretary.

(b) The amounts appropriated and made available for grants to the States for projects under this Act for each fiscal year shall be apportioned among the States by the Secretary in accordance with needs as disclosed in approved statewide historic preservation plans. The Secretary shall notify each State of its apportionment, and the amounts thereof shall be available thereafter for payment to such State for projects in accordance with the provisions of this Act. Any amount of any apportionment that has not been paid or obligated by the Secretary during the fiscal year in which such notification is given, and for two fiscal years thereafter, shall be reapportioned by the Secretary in accordance with this subsection.
Sec. 104. (a) No grant may be made by the Secretary for or on account of any survey or project under this Act with respect to which financial assistance has been given or promised under any other Federal program or activity, and no financial assistance may be given under any other Federal program or activity for or on account of any survey or project with respect to which assistance has been given or promised under this Act.

(b) In order to assure consistency in policies and actions under this Act with other related Federal programs and activities, and to assure coordination of the planning acquisition, and development assistance to States under this Act with other related Federal programs and activities, the President may issue such regulations with respect thereto as he deems desirable, and such assistance may be provided only in accordance with such regulations.

Sec. 105. The beneficiary of assistance under this Act shall keep such records as the Secretary shall prescribe, including records which fully disclose the disposition by the beneficiary of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, and the amount and nature of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit.

Sec. 106. The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under title II of this Act a reasonable opportunity to comment with regard to such undertaking.

Sec. 107. Nothing in this Act shall be construed to be applicable to the White House and its grounds, the Supreme Court building and its grounds, or the United States Capitol and its related buildings and grounds.

Sec. 108. There are authorized to be appropriated not to exceed $2,000,000 to carry out the provisions of this Act for the fiscal year 1967, and not more than $10,000,000 for each of the three succeeding fiscal years. Such appropriations shall be available for the financial assistance authorized by this title and for the administrative expenses of the Secretary in connection therewith, and shall remain available until expended.

TITLE II

Sec. 201. (a) There is established an Advisory Council on Historic Preservation (hereinafter referred to as the "Council") which shall be composed of seventeen members as follows:

1. The Secretary of the Interior.
2. The Secretary of Housing and Urban Development.
3. The Secretary of Commerce.
4. The Administrator of the General Services Administration.
5. The Secretary of the Treasury.
7. The Chairman of the National Trust for Historic Preservation.
(8) Ten appointed by the President from outside the Federal Government. In making these appointments, the President shall give due consideration to the selection of officers of State and local governments and individuals who are significantly interested and experienced in the matters to be considered by the Council.

(b) Each member of the Council specified in paragraphs (1) through (6) of subsection (a) may designate another officer of his department or agency to serve on the Council in his stead.

(c) Each member of the Council appointed under paragraph (8) of subsection (a) shall serve for a term of five years from the expiration of his predecessor's term; except that the members first appointed under that paragraph shall serve for terms of from one to five years, as designated by the President at the time of appointment, in such manner as to insure that the terms of not less than one nor more than two of them will expire in any one year.

(d) A vacancy in the Council shall not affect its powers, but shall be filled in the same manner as the original appointment (and for the balance of the unexpired term).

(a) The Chairman of the Council shall be designated by the President.

(f) Eight members of the Council shall constitute a quorum.

Sect. 203. (a) The Council shall—

(1) advise the President and the Congress on matters relating to historic preservation; recommend measures to coordinate activities of Federal, State, and local agencies and private institutions and individuals relating to historic preservation; and advise on the dissemination of information pertaining to such activities;

(2) encourage, in cooperation with the National Trust for Historic Preservation and appropriate private agencies, public interest and participation in historic preservation;

(3) recommend the conduct of studies in such areas as the adequacy of legislative and administrative statutes and regulations pertaining to historic preservation activities of State and local governments and the effects of tax policies at all levels of government on historic preservation;

(4) advise as to guidelines for the assistance of State and local governments in drafting legislation relating to historic preservation; and

(b) The Council shall submit annually a comprehensive report of its activities and the results of its studies to the President and the Congress and shall from time to time submit such additional and special reports as it deems advisable. Each report shall propose such legislative enactments and other actions as, in the judgment of the Council, are necessary and appropriate to carry out its recommendations.

Sect. 204. The members of the Council specified in paragraphs (1) through (7) of section 201(a) shall serve without additional compen-
sation. The members of the Council appointed under paragraph (8) of section 201(a) shall receive $100 per diem when engaged in the performance of the duties of the Council. All members of the Council shall receive reimbursement for necessary traveling and subsistence expenses incurred by them in the performance of the duties of the Council.

Sec. 205. (a) The Director of the National Park Service or his designee shall be the Executive Director of the Council. Financial and administrative services (including those related to budgeting, accounting, financial reporting, personnel, and procurement) shall be provided by the Council by the Department of the Interior, for which payments shall be made in advance, or by reimbursement, from funds of the Council in such amounts as may be agreed upon by the Chairman of the Council and the Secretary of the Interior: Provided, That the regulations of the Department of the Interior for the collection of indebtedness of personnel resulting from erroneous payments (5 U.S.C. 40a) shall apply to the collection of erroneous payments made to or on behalf of a Council employee, and regulations of said Secretary for the administration of funds (31 U.S.C. 665 (g)) shall apply to appropriations of the Council: And provided further, That the Council shall not be required to prescribe such regulations.

(b) The Council shall have power to appoint and fix the compensation of such additional personnel as may be necessary to carry out its duties, without regard to the provisions of the civil service laws and the Classification Act of 1949.

(c) The Council may also procure, without regard to the civil service laws and the Classification Act of 1949, temporary and intermittent services to the same extent as is authorized for the executive departments by section 15 of the Administrative Expenses Act of 1946 (5 U.S.C. 55a), but at rates not to exceed $50 per diem for individuals.

(d) The members of the Council specified in paragraphs (1) through (6) of section 201(a) shall provide the Council, on a reimbursable basis, with such facilities and services under their jurisdiction and control as may be needed by the Council to carry out its duties, to the extent that such facilities and services are requested by the Council and are otherwise available for that purpose. To the extent of available appropriations, the Council may obtain, by purchase, rental, donation, or otherwise, such additional property, facilities, and services as may be needed to carry out its duties.


Public Law 89-666

AN ACT

To amend the Act of September 13, 1962, authorizing the establishment of the Point Reyes National Seashore in the State of California, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of September 13, 1962 (76 Stat. 553) is hereby amended as follows:

(a) Strike subsection (b) of section 2 and substitute therefor: "The area referred to in subsection (a) shall also include a right-of-way to the aforesaid tract in the general vicinity of the northwestern portion of the property known as 'Bear Valley Ranch', to be selected by the Secretary, of not more than four hundred feet in width, together with such adjoining lands as would be deprived of access by reason of the acquisition of such right-of-way.'"

(b) In section 8 strike out "$14,000,000" and substitute "$19,135,000". Approved October 15, 1966.
Steps to Improve Compliance:
1. Identify Native American nation/tribe.
2. Provide tribal notification.
3. Engage tribe in service plan development.
4. Follow placement preferences.
5. Make active efforts to provide remedial services and rehabilitative programs.

Who Is an Indian Child?
Definition of Indian Child: Section 2 (36) of the Social Services Law
Indian child shall mean any unmarried person who:
(a) is under the age of 18, or
(b) is under the age of 21, entered foster care prior to his/her 18th birthday, who remains in foster care, and who:
• is a member of an Indian nation/tribe; or
• is eligible for membership in an Indian nation/tribe; or
• is the biological child of a member of an Indian nation/tribe and is residing on, or is domiciled within, an Indian reservation.

What About Clan Identification?
Clan identification can assist caseworkers in identifying extended family members for placement:
• Clans are matrilineal and identify traditional kinship resources.
• The clans of the Haudenosaunee (Iroquois) are Bear, Beaver, Deer, Eel, Hawk, Heron, Snipe, Turtle, and Wolf.
• The caseworker should ask if the family member knows the name of their clan.

Facts:
• There are nine recognized Native American nations/tribes in New York State and over 560 federally recognized tribes in the United States.
• The majority of Native Americans living in New York State do not reside on reservations. They live in rural areas as well as large urban centers, with an estimated 52,000 living in New York City and on Long Island.
• The New York State Office of Children and Family Services (OCFS) Native American Services office maintains a current list of tribal contacts who can assist you: (716) 847-3123.

How Do I Know If a Child Is Eligible for Tribal Membership?
• Ask the child’s family if they are aware of any tribal affiliation.
• Find out if a parent or grandparent has a tribal enrollment card.
• Develop a family tree indicating the mother’s and grandmother’s maiden names and the names of the father and paternal grandparents.
• Call the Tribal Office directly.

For further information on Native American Programs, see A Proud Heritage: Native American Services in New York State (OCFS Publication #4629) and A Guide to Compliance of the Federal Indian Child Welfare Act in New York State (OCFS Publication #4757).
Indian Child Welfare Process

Reasonable Efforts to Prevent Placement of an Indian Child

ICWA requires that in any child custody proceeding initiated by the social services district pursuant to Section 358-a or 384-b of the Social Services Law or Article 7 or 10 of the Family Court Act, is required to notify the child's parent or Indian custodian and the child's Indian nation/tribe, by registered mail, of the pending proceeding and of their right to intervention. If the identity or location of the parent or Indian custodian and the nation/tribe cannot be determined, notice must be given by registered mail to the New York State Office of Children and Family Services (listed on p. 4) and to the federal government at this address:

U.S. Department of the Interior
Eastern Regional Office
Bureau of Indian Affairs
545 Marriott Drive, Suite 700
Nashville, TN 37214

Note: Because the ICWA notification requirements apply to involuntary proceedings, Article 7 cases are included.

Tribal Notification Procedures

The contents of such notification of the child custody proceeding must include all of the following information:

- The child's name, date of birth, and place of birth.
- The child's tribal affiliation, if known.
- The names of the child's parents, dates of birth of the child's parents, places of birth of the child's parents, the child's mother's maiden name.
- A copy of the petition filed with the court.
- A statement of the rights of the biological parents/custodians to intervene in the proceeding.
- A statement of right under federal law to court-appointed counsel.
- The location, mailing address, and telephone number of the court.
- The child's tribal affiliation, if known.

Qualified Expert Witness

OCFS Regulation, 18 NYCRR 431.18 (a) and (b)

This section states that the testimony of a qualified expert witness is required in any foster care placement and in any proceeding for the termination of parental rights. This witness is defined as a person who is qualified to speak on whether continued custody by the parents of an Indian child or an Indian custodian is likely to result in serious physical or emotional injury to the child.

New York State Statutory and Regulatory Requirements to Implement the Federal Indian Child Welfare Act

Notification Requirements

OCFS Regulation, 18 NYCRR 431.18 (c)

The social services district, in any child custody proceeding initiated by the district pursuant to Section 384-b of the Social Services Law or Article 7 or 10 of the Family Court Act, is required to notify the child's parent or Indian custodian and the child's Indian nation/tribe, by registered mail, of the pending proceeding and of their right to intervention. If the identity or location of the parent or Indian custodian and the nation/tribe cannot be determined, notice must be given by registered mail to the New York State Office of Children and Family Services (listed on p. 4) and to the federal government at this address:

U.S. Department of the Interior
Eastern Regional Office
Bureau of Indian Affairs
545 Marriott Drive, Suite 700
Nashville, TN 37214

Note: Because the ICWA notification requirements apply to involuntary proceedings,” Article 7 cases are included.

Tribal Notification Procedures

The contents of such notification of the child custody proceeding must include all of the following information:

- The child's name, date of birth, and place of birth.
- The child's tribal affiliation, if known.
- The names of the child's parents, dates of birth of the child's parents, places of birth of the child's parents, the child's mother's maiden name.
- A copy of the petition filed with the court.
- A statement of the rights of the biological parents/custodians to intervene in the proceeding.
- A statement of right under federal law to court-appointed counsel.
- The location, mailing address, and telephone number of the court.

Qualified Expert Witness

OCFS Regulation, 18 NYCRR 431.18 (a) and (b)

This section states that the testimony of a qualified expert witness is required in any foster care placement and in any proceeding for the termination of parental rights. This witness is defined as a person who is qualified to speak on whether continued custody by the parents of an Indian child or an Indian custodian is likely to result in serious physical or emotional injury to the child.
Panel One – Challenging Issues

Reforming Federal Indian Law to Support Tribal Economic Development

Robert Odawi Porter
“Reforming Federal Indian Law to Support Tribal Economic Development”

Albany Government Law Review Native American Law in the Modern Era Symposium

Robert Odawi Porter, Esq.

March 10, 2016

D +1 202 408 6348
M +1 202 308 3522
robert.porter@dentons.com
Poverty still reigns. Indian Country remains some of the most economically underdeveloped territory within the United States.

Structural Barriers Inhibit Growth. Despite the success that some Indian nations tribes have had with gaming, most have not recovered from generations of chronic economic deprivation from failed government policies.

Few Development Incentives Promote Diversification. Unlike gaming, where legal and economic conditions were aligned to induce billions of dollars of investment, few incentives exist to promote investment on tribal lands beyond gaming projects.
WHAT ARE SOME OF THE REASONS WHY INDIAN COUNTRY HAS NOT DEVELOPED OUTSIDE OF GAMING?

- **Federal Indian Economic Policy Chaos.** Indian tribal economies have been destroyed by historic federal government policies that promote dependence on the federal government.

- **Federal Government Dependent Land Status.** Most Indian lands are subject to direct federal regulation and not easy to develop.

- **Jurisdictional Confusion.** Indian tribal governments do not have clear and absolute control over all tribal lands, especially allotted territories.

- **Hostile Neighbors.** Indian tribes experience on-going threats from outside governments, organizations, and individuals who seek to thwart tribal economic development and economic recovery.
Failed Federal Policies. Over 200 years, the United States has crippled the ability of Indian nations and tribes to have internal economies sufficient to sustain their citizens through removal, allotment, etc.

Underdeveloped Tribal Infrastructure. Decades of paternalistic federal economic and political policies have weakened internal development structure.

Gaming is the exception to the trend

But how to re-create tribal economic growth conditions outside of gaming?
FEDERAL INDIAN POLICY MUST CHANGE TO ALLOW FOR MORE TRIBAL FREEDOM OVER DEVELOPMENT

MORE TRIBAL FREEDOM = MORE TRIBAL DEVELOPMENT

- **Land.**
  - Tribal lands must be less regulated and easier to develop.

- **Jurisdiction.**
  - Tribal lands must retain regulatory and tax advantages.
  - Tribal governments must have more authority over their own land.

- **Friendly Neighbors.**
  - Outside governments must not be allowed to tax and regulate tribal development.
Piecemeal Efforts.
- Grants, technical assistance, some regulatory reform.

No Plan.
- There is no comprehensive federal policy in place in promote tribal economic development

No Remedy for Failed Policies of the Past.
- Self-determination, Self-governance and Consultation policies do not alleviate the effects of decades of crippling federal policies and laws that undermine tribal sovereignty and tribal development

---

March 10, 2016
Albany Indian Law Symposium
WHY MUST FEDERAL INDIAN POLICY CHANGE SO THAT TRIBES CAN BETTER DEVELOPMENT?

- The U.S. has Created a Legal Mess for Development –
  - Only the U.S. government can fix federal law problems

- The Problem is Getting Worse – The “Tribal Fiscal Cliff”
  - Gaming tribes face increasing competition from land-based and Internet-based gaming businesses.
  - Non-gaming tribes may have never achieved any degree of economic prosperity, and so remain economically vulnerable.
  - All tribes face the increasing decline of federal appropriations
WHAT ARE THE ELEMENTS OF A COMPREHENSIVE FEDERAL INDIAN ECONOMIC POLICY?

- **Improved Tribal Self-Regulation over Lands and Jurisdiction** –
  - Congress needs to restrict federal court and agency interference

- **Promote Tribal Revenue Growth** –
  - Pre-empt state and local taxation of on-territory business activity
  - Provide tax incentives for economic development such as Tribal Empowerment Zones
  - Establish Treasury Department Self-governance to support tribal government

- **Support Indian Entrepreneurship** –
  - Promote hybrid tribal economies by supporting individual business development

- **Ensure Federal Trust Responsibility** --
  - Guarantee federal appropriations as an entitlement like Social Security

March 10, 2016

Albany Indian Law Symposium
WHAT CAN THE ADMINISTRATION AND CONGRESS DO TO SUPPORT TRIBAL ECONOMIC DEVELOPMENT?

- Develop a Long-Range Tribal Economic Policy
  - No comprehensive Presidential policy effort since 1983 Reagan Blue Ribbon Commission
  - Focus efforts of the new White House Native American Advisory Council on developing a comprehensive economic development plan

- Develop Tribal Economic Develop Package to take to Congress

- Engage Tribal Leaders to develop and advocate for restructuring the tribal development landscape
WHAT FEDERAL INDIAN LAW CHANGES ARE ALREADY OCCURRING?

- **Freedom to Develop Tribal Land** –
  - Part 162 Federal Leasing Regulations
  - HEARTH Act of 2012 (Sen. Heinrich)

- **Freedom to Exercise Tribal Regulation and Promote Investment on Tribal Lands**
  - H.R. 538 Act to Facilitate Energy Development (Rep. Young)
Promote Tribal Revenue Generation and Investment
- Create Tribal Empowerment Zones
  - 50 acres of totally tax-immune land to attract investment
- Pre-empt State and Local Taxation of on-territory economic activities
- Eliminate distinction between income “earned on” tribal lands from income “derived from” tribal lands
- Support Treasury Department Self-governance

Promote Indian Entrepreneurship
- 100% immunity for self-employment income on tribal lands
WHAT OTHER FEDERAL INDIAN POLICY CHANGES SHOULD OCCUR

- **Expand and Restructure Existing Federal Indian Policy**
    - “To revitalize economically and physically distressed Native American economies . . .”
    - “To promote private investment in the economies of Indian tribes . . .”
    - “To promote the long-range sustained growth of the economies of Indian tribes . . .”

- **Federal Funding Guarantee**
  - The United States should never cut back Indian appropriations
  - Financial commitments to Indian Country are an entitlement no different than Social Security benefits
  - Tribal economic success should not jeopardize current funding levels

March 10, 2016
Albany Indian Law Symposium
NEX T S T E P S ?

- Develop a tribal coalition focused on developing long-range Tribal Economic Policy and reform package

- Encourage intertribal organizations to focus efforts on comprehensive federal economic policy for Indian Country

- Identify Congressional supporters

- Encourage Obama Administration to lead on Indian Country economic recovery
  - Task White House Native American Affairs Advisory Committee
QUESTIONS?
CALL OR E-MAIL ME AT
(202) 308-3522 OR
ROBERT.PORTER@DENTONS.COM
Robert Odawi Porter helps Indian nations, tribal companies, and Indian-owned businesses seize opportunities and resolve difficult problems at the intersection of law, politics, economics, and media.

Rob has 25 years experience in Indian law, with particular emphasis on treaty rights protection and defense of tribal sovereignty. Rob’s unique approach to problem solving reflects his nearly 10 years as the chief legal counsel of the Seneca Nation, founding chairman of Seneca Holdings, LLC and a term as the Nation’s elected president.

Rob is a graduate of Harvard Law School and Syracuse University and served 15 years as a professor of Indian law at the University of Kansas, the University of Iowa, and Syracuse University.

Rob is a citizen of the Seneca Nation and resides with his family on the Nation’s Allegany Territory.
Public Law 106–179
106th Congress

An Act

Mar. 14, 2000
[S. 613]

To encourage Indian economic development, to provide for the disclosure of Indian tribal sovereign immunity in contracts involving Indian tribes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Indian Tribal Economic Development and Contract Encouragement Act of 2000".

SEC. 2. CONTRACTS AND AGREEMENTS WITH INDIAN TRIBES.

Section 2103 of the Revised Statutes (25 U.S.C. 81) is amended to read as follows:

Sec. 2103. (a) In this section:

(1) The term 'Indian lands' means lands the title to which is held by the United States in trust for an Indian tribe or lands the title to which is held by an Indian tribe subject to a restriction by the United States against alienation.

(2) The term 'Indian tribe' has the meaning given that term in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)).

(3) The term 'Secretary' means the Secretary of the Interior.

(b) No agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary.

(c) Subsection (b) shall not apply to any agreement or contract that the Secretary (or a designee of the Secretary) determines is not covered under that subsection.

(d) The Secretary (or a designee of the Secretary) shall refuse to approve an agreement or contract that is covered under subsection (b) if the Secretary (or a designee of the Secretary) determines that the agreement or contract—

(1) violates Federal law; or

(2) does not include a provision that—

(A) provides for remedies in the case of a breach of the agreement or contract;

(B) references a tribal code, ordinance, or ruling of a court of competent jurisdiction that discloses the right of the Indian tribe to assert sovereign immunity as a defense in an action brought against the Indian tribe; or

(C) includes an express waiver of the right of the Indian tribe to assert sovereign immunity as a defense
in an action brought against the Indian tribe (including a waiver that limits the nature of relief that may be provided or the jurisdiction of a court with respect to such an action).

“(e) Not later than 180 days after the date of enactment of the Indian Tribal Economic Development and Contract Encouragement Act of 2000, the Secretary shall issue regulations for identifying types of agreements or contracts that are not covered under subsection (b).

“(f) Nothing in this section shall be construed to—

“(1) require the Secretary to approve a contract for legal services by an attorney;

“(2) amend or repeal the authority of the National Indian Gaming Commission under the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.); or

“(3) alter or amend any ordinance, resolution, or charter of an Indian tribe that requires approval by the Secretary of any action by that Indian tribe.”

SEC. 3. CHOICE OF COUNSEL.

Section 18(e) of the Act of June 18, 1934 (commonly referred to as the "Indian Reorganization Act") (48 Stat. 987, chapter 576; 25 U.S.C. 476(o)) is amended by striking “, the choice of counsel and fixing of fees to be subject to the approval of the Secretary”.

Approved March 14, 2000.
2008 Edition
By
Karen J. Atkinson, President, Tribal Strategies, Inc.
and
Kathleen M. Nilles, Partner, Holland & Knight LLP

A Tribal Self-Governance Project of the Tulalip Tribes
Sponsored and Published by
The Office of the Assistant Secretary – Indian Affairs
Credit: This Handbook was funded by an economic development grant awarded by the U.S. Department of the Interior’s Office of Indian Energy and Economic Development (IEED) to the Tulalip Tribes of Washington for the development of a tribal biogas plant in Snohomish County.

Disclaimer: Nothing in this Handbook should be construed or relied upon as legal advice. Instead, this Handbook is intended to serve as general guidance and an introduction to business structure from which better informed requests for legal advice and tax advice can be formulated.

Published by:

The Office of the Assistant Secretary – Indian Affairs
U.S. Department of Interior
Foreword by the Sponsor and Publisher

The Office of Indian Energy and Economic Development (IEED) was established in 2006. IEED is responsible for expanding reservation business opportunities and Indian employment with emphasis on the development of energy and mineral resources on Indian trust lands; providing oversight of initiatives designed to assist tribes in developing stronger reservation and/or tribal economies; developing policies and procedures for job placement and training under the Indian Employment Training and Related Services Demonstration Act of 1992 (P.L. 102-477), as amended; and providing credit under the Indian Financing Act of 1974. The office formulates policies and procedures to surmount barriers to reservation economic growth and assists tribes in developing economic infrastructure, augmenting business knowledge, increasing jobs, businesses, and capital investment, and developing energy and mineral resources. IEED helps tribes develop their energy and mineral resources on trust lands and manages special economic programs, grants, projects and initiatives to advance reservation economies. In addition, the office is responsible for implementing P.L. 102-477, as amended; the Indian Financing Act of 1974; and Title V of the Energy Policy Act of 2005. The office consists of the Division of Energy and Mineral Development, the Division of Economic Development, the Division of Workforce Development, the Division of Capital Investment, and the Division of Indian Energy Resource Agreements.

We undertook this project to further our mission of developing economic infrastructure and increasing business knowledge. We think tribal governments will find the Handbook filled with many specifics that will help them and their business managers pinpoint issues for analysis in the quest to select the best business structure.

For tribal governments starting to think about launching a business enterprise, the Handbook will become a primary reference. The authors have taken care to streamline the discussions about each of the business structures. This should enable tribal governments to make informed decisions about which structure to discuss with tribal legal counsel and the tribal accountant.

For tribal government officials who are unfamiliar with business structures, the Handbook can also impart an understanding of how various Indian business enterprises function by comparison. We hope that this will encourage tribal governments to consult with one another regarding the success tribal businesses have achieved because of (and not in spite of) their structures.

There will be a second edition of the Handbook in the next several years.

Robert W. Middleton, Ph.D.
Director, Office of Indian Energy and Economic Development
The Authors

Karen J. Atkinson is Mandan, Hidatsa, and Tsimshian and President of Tribal Strategies, Inc. in Washington, D.C. Karen has extensive experience as a legal and policy advisor on federal Indian law and tribal economic development. She has experience in energy planning and development, business consulting for Indian tribal governments, and advising companies seeking to work with tribes. Karen focuses on creating public/private partnerships that increase economic development in tribal communities. She has provided advice on how to form tribal business entities, on how to create tribal business partnerships, and on financing options and tax incentives for projects in Indian Country.

Kathleen M. Nilles is a partner with Holland & Knight LLP (resident in its Washington, D.C. office) and a member of the firm's Indian Law practice group. Kathleen has almost twenty years of experience advising tribal governments on tax and corporate issues. In the course of her practice as a tax attorney, she has assisted tribes in structuring numerous types of business entities and has secured IRS rulings and determinations to confirm their tax treatment. Kathleen has also provided legal advice on joint ventures, tax-exempt financing, energy tax incentives, and employment tax issues. She is a member of the Board of Directors of the National Intertribal Tax Alliance. Kathleen gratefully acknowledges the assistance, advice and contributions of her colleagues at Holland & Knight, particularly Telly Meier, Jerry Levine, Allyson Saunders, Brian Guth and Sam Kastner.
# Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>TABLE OF CONTENTS</td>
<td>i</td>
</tr>
<tr>
<td>I. INTRODUCTION</td>
<td>I-1</td>
</tr>
<tr>
<td>A. Why Choosing a Business Structure is Important</td>
<td>I-2</td>
</tr>
<tr>
<td>B. Success Factors</td>
<td>I-2</td>
</tr>
<tr>
<td>C. Overview of Structures</td>
<td>I-4</td>
</tr>
<tr>
<td>D. Success Factors</td>
<td>I-6</td>
</tr>
<tr>
<td>II. TRIBAL GOVERNMENT ENTITIES</td>
<td>II-1</td>
</tr>
<tr>
<td>A. Unincorporated Agencies, Divisions and Instrumentalities</td>
<td>II-1</td>
</tr>
<tr>
<td>B. Political Subdivision of Tribal Government</td>
<td>II-13</td>
</tr>
<tr>
<td>III. TRIBAL CORPORATIONS</td>
<td>III-1</td>
</tr>
<tr>
<td>A. Tribally-Chartered Corporations</td>
<td>III-1</td>
</tr>
<tr>
<td>B. Section 17 Corporation—Federal Law Corporation</td>
<td>III-10</td>
</tr>
<tr>
<td>IV. STATE LAW ENTITIES</td>
<td>IV-1</td>
</tr>
<tr>
<td>A. State Law Corporations</td>
<td>IV-1</td>
</tr>
<tr>
<td>B. Subchapter S Corporations</td>
<td>IV-6</td>
</tr>
<tr>
<td>C. State-Law Limited Liability Companies</td>
<td>IV-7</td>
</tr>
<tr>
<td>D. Advantages and Disadvantages of State-Law Business Entities</td>
<td>IV-10</td>
</tr>
<tr>
<td>V. JOINT VENTURE ENTITIES</td>
<td>V-1</td>
</tr>
<tr>
<td>A. Limited Liability Companies</td>
<td>V-2</td>
</tr>
<tr>
<td>B. General Partnerships and Limited Partnerships</td>
<td>V-3</td>
</tr>
<tr>
<td>C. Considerations Common to LLCs and LPs</td>
<td>V-4</td>
</tr>
<tr>
<td>VI. EVALUATING YOUR OPTIONS</td>
<td>VI-1</td>
</tr>
<tr>
<td>A. Comparison of Each Form</td>
<td>VI-1</td>
</tr>
<tr>
<td>B. Key Factors to Consider</td>
<td>VI-4</td>
</tr>
</tbody>
</table>

**CHART: STRUCTURES AT A GLANCE**

**APPENDIX A:** Sovereign Immunity Factors in Recent Judicial Decisions

**APPENDIX B:** Key Steps to Protect the Corporate Veil and to Limit Liability

**ENDNOTES**
I.

INTRODUCTION

The late 20th century brought a new era of federal-tribal relationships and a policy of self-determination to Indian country. Indian Tribes are increasingly asserting control over their land, resources, and governance of their communities. Tribes are involved in a wide range of economic activities from tourism, gaming, energy, agriculture, forestry, manufacturing, federal contracting, and telecommunications. In many parts of the country, Tribes are becoming regional economic and political power houses. They are the largest employer in many counties. Tribal governments and tribal businesses engage in a wide range of business and financial transactions.

The unique legal status of tribes is only now beginning to be used by Tribal governments to contribute to their business and economic development efforts. This century marks a new era for tribes using their sovereign status and governmental authority to achieve economic self-sufficiency and cultural preservation. There are still high levels of poverty and unemployment in Indian country and a lack of the basic infrastructure crucial to the building blocks of economic success. There are, however, increasingly more examples of tribes breaking their dependence on federal programs and creating the necessary legal infrastructure to build the foundations for successful economic development.

As tribal business transactions become increasingly more sophisticated and involve non-Indian partners, investors, and lenders, there is a need to understand the basic methods for doing business in Indian country. In particular, in the energy industry, Indian tribes are shifting from being passive owners of their energy resources by evaluating ways in which they can own, develop, and produce their resources. Tribes are increasingly looking at ways to develop their resources in a manner that gives them an active ownership interest in the development of the project, often with a non-Indian business partner.

There are unique factors that a tribe should consider when deciding how to structure a business transaction or how to partner with a non-Indian business. This Handbook will provide a general guide to the key factors that an Indian tribe should consider when structuring a business or project. It will look at the basic structures available to tribal governments when organizing for economic development activities and will consider whether business formation should occur under tribal, federal or state law. It will also consider the tax consequences of each type of business structure. The Handbook will assist tribal managers in determining which structure will work best to protect tribal assets, preserve tribal sovereignty, and maximize the use of tax and other incentives available for tribal economic development. This guide is general in nature. You should consult legal counsel and accountants to determine the best business structure for your particular circumstances.
A. Why Choosing a Business Structure is Important

The choice of business structure will have long-term and far-reaching consequences for a tribal government and tribal business. The business structure you choose will have a major impact on how tribal assets are protected, how tribal sovereignty is preserved, and how potential liability is minimized. Critical decisions regarding the tax status of the business entity and whether or how sovereign immunity is waived must be made early in the decision making process. The choice of business structure may also be determined by the requirements a lender imposes as a financing condition or be determined by a business partner seeking certainty and predictability in the legal framework chosen to organize for economic development. This Handbook will help you to compare and analyze different structures and help determine which is best for you.

B. Success Factors

In the last decade, a substantial amount of research has been done to determine what impediments exist to creating long term sustainable economic development on Indian reservations and to identify the factors that have lead to significant progress on some reservations. Most tribes are committed to improving the economic welfare of its people and at the same time are concerned that this not be done in a way that diminishes their sovereignty. The Harvard Project on American Indian Economic Development (Harvard Project) has found that a key factor to achieve economic self-determination is to have institutions in place which promote self-governance and to provide a political environment in which investors will feel secure.¹

Indian reservations have to compete with other venues to attract economic activities. To be successful, tribes must offer investors the opportunity to earn economic returns commensurate with the returns they might earn elsewhere. Investment dollars have to come from somewhere. Investor risk is raised if there is uncertainty in tax and regulatory policies that apply to on-reservation businesses or transactions. Risk is also raised if there is uncertainty regarding the enforcement of contracts or agreements. Governmental policies requiring preference hiring or policies that change frequently can also raise the risk and costs for investors or business partners.

The Harvard Project has identified a number of success factors geared to create a political environment that promotes sustained economic growth by providing a safe environment for investors. Such an environment helps investors--whether they be tribal members or outsiders--to feel secure and willing to put their time, energy and capital into the tribal economy. The first critical factor is for tribes to have a separation and allocation of governmental powers. This can be accomplished through formal or informal governmental structures.

The second critical factor is the separation of tribal electoral politics from the day-to-day management of business enterprises. This relates to the direct role that tribal governments often have in development projects. Tribal governments should have a role in strategic decision-making. However, tribal governments should not make the day-to-day business decisions of tribal enterprises. Maintaining this separation can be difficult for tribal officials since enterprises and its assets belong to all tribal members. However, not insulating tribal politics from tribal
businesses can create an uncertain and risky business environment for investors and business partners. Political instability, the possibility of opportunism on the part of tribal officials, and the difficulties in enforcing agreements can discourage investment. This can place tribes at a competitive disadvantage for attracting capital as well as technical and management expertise.

Inserting politics into day-to-day business decisions can drain the resources of the entity, and run a tribal enterprise into the ground. This type of governance will result in inefficiencies and loss of productivity that is difficult to absorb in a highly competitive environment.

Successful businesses in Indian country are typically insulated and their day-to-day business management is free from political interference. The Harvard Project found that tribally-owned enterprises that are insulated from political interference are about four times as likely to be profitable as those that are not.\(^2\) The way tribes’ have insulated business from politics has ranged from traditional culture-based separation of power to legal or tribal constitutional limits to the establishment of separate tribal entities and manage businesses. Insulating tribal business entities from political interference is accomplished by establishing a managing board of directors and a corporate charter that is beyond the direct control of tribal council members.

Businesses require a stable operating environment while managers need to make decisions in a business environment. The creation of a tribal business development corporation or other business entity separated from tribal government can provide a number of advantages:

- Free the tribal council from micro-managing tribal businesses and allow the council to focus on long-term development strategies and goals
- Assign responsibility to operate and manage tribal businesses to those who have business skill and knowledge
- Provide a buffer between managers and tribal politics
- Provide continuity and stability to business management by promoting the development of economic development and business policies that are less subject to change by electoral politics.\(^3\)

This Handbook will describe a variety of options for tribes to consider when structuring tribal businesses in a way that segregates business from politics.

Key factors to consider when trying determining the best structure for a particular activity are:

**Segregate politics from business**—Free the tribal council from micro-managing tribal businesses while allowing the council to focus on long-term development strategies and goals. Assign responsibility to operate and manage tribal businesses to those who have business skill and knowledge.

**Organizational considerations**—How the entity is formed, under what law is the entity formed, and who manages the entity.
**Sovereign Immunity**—Tribes as governmental entities are not subject to suit unless they clearly waive immunity or Congress has waived their immunity. This raises questions regarding the ability of lenders, investors, and business partners to enforce agreements and to protect their investment. Each entity has different sovereign immunity implications that must be considered.

**Liability**—Some business structures effectively shield business owners from liability for the financial obligations and debts of the business. Others do not effectively separate owner obligations from business entity obligations.

**Tax considerations**—Different federal income tax rules apply to different business types. State tax liability frequently depends on whether the business activity is conducted on or off an Indian reservation.

**Financing**—Money for a business comes in two forms: (1) debt—whereby the business borrows and then owes money to others; and (2) equity—where investors provide funding and then own part of the business. Lenders generally do not dictate choice of business entity, but equity investors may specify what business structure you can choose.

**C. Overview of Structures**

Tribal governments are distinct political entities in our federal system of government. They have the power of self-government and exercise sovereignty over their members and territory. Their sovereignty pre-dates the Constitution and is derived from the fact that they owned all the land that is now the United States. The U.S. Constitution acknowledges the sovereign status of Indian tribes in the Treaty Clause, in the 14th Amendment as "Indians not taxed," and in the Commerce Clause. The sovereign nature of Tribes has been recognized in the Constitution, treaties, court decisions, and the course of dealing with tribes. As sovereign Nations, Indian tribes have powers and capabilities not available to individuals. This Handbook will assist you in evaluating the different forms available for organizing economic development and to begin to take steps to achieve financial and economic independence.

When developing a new tribal enterprise, an important consideration is the applicable law and regulations governing its formation and operation. In Indian country, business entities can be formed under tribal law, state law or federal law. Your choice of law and the entity that is chosen will have consequences on issues relating to tax, financing, and sovereign immunity. It will also determine how you can maximize risks and liability. An important consideration for tribes is how to preserve tribal control and to protect tribal assets while providing a business partner or lender with certainty.

A tribe, because it is a sovereign nation, can form a governmental entity to perform business functions. This entity can be an instrumentality of tribal government, a political subdivision of the tribe, or an agency or division of the tribe. A tribe can also form a separate business entity formed under federal, tribal, or state law.

Below is a brief description of the main business structures.
1. **Tribal Government**

Many tribes conduct business through an economic development arm of the tribe. This is often referred to as in unincorporated instrumentality of the tribe. The business operation is generally overseen by the governing body of the tribe--sometimes by a business committee or a separate board, but they generally do not have a separate legal structure. Therefore, the same privileges and immunities of the tribe can apply to contractual agreements entered into by the tribe and to business instrumentalities of the tribe. Tribes and its business instrumentalities organized as an arm of the tribal government are not taxable entities for purposes of federal income tax.

2. **Section 17 Corporations**

Many tribes conduct their commercial activities through federally-chartered corporations formed under Section 17 of the Indian Reorganization Act (IRA). To form a Section 17 Corporation, a tribe must petition the Secretary of the Interior for issuance of a corporate charter. A Section 17 corporation provides a framework by which a tribe can segregate tribal business assets and liabilities from the assets and liability of tribal governmental assets. It also preserves the integrity of the decision-making process of tribal governmental officials by separating business decisions. The charter defines the powers of the corporation which can include the power to buy and sell real and personal property and to conduct such further powers as may be incidental to the conduct of corporate business. Several courts have held that tribal sovereign immunity applies to the business activities conducted by a Section 17 Corporation; other courts have found a waiver of sovereign immunity in the "sue and be sued" clause of the corporate charter. Tribal corporations formed under Section 17 of the IRA have the same tax status as the tribe and are not subject to federal income taxes for income derived from on or off reservation activities.

3. **Tribally Chartered Corporations**

Some tribes have adopted tribal laws that govern the formation of tribally chartered for-profit corporations. These laws authorize the formation of tribal business entities owned by the tribe. Several courts have held that sovereign immunity applies to activities of a tribally chartered corporation owned by a tribe. The issue of whether tribally charted corporations are subject to federal income taxes for income derived from on-reservation activities is up in the air. The Internal Revenue Service has this issue under consideration and has indicated that it will issue guidance, but has not yet done so.

4. **State-law Corporation**

A corporation is a legal entity that is formed under the laws of the state by filing a certificate of incorporation or articles of incorporation with the jurisdiction in which it is formed. Corporations are owned by shareholders and governed by a Board of Directors elected by the shareholders. Corporations are governed by the terms and conditions contained in its articles of incorporation. The main benefit of a corporation is that shareholders are not personally liable for the debts, obligations, or liabilities of the corporation. Shareholders are liable only for the
amount of their investment in the corporation. This insulates tribal government assets from the liabilities of a tribal corporation. However, a corporation is a separate taxpayer. Income is taxed twice, once at the entity level and again when distributed to shareholders as dividends. A corporation owned by a tribe, but chartered under state law is considered to have a different tax status than the tribe and is likely subject to federal income tax.

5. **Limited Liability Company**

The limited liability company (LLC) is a relatively new form of business entity that rose to prominence in the last ten years. Almost every state has enacted laws permitting the formation of an LLC. LLCs are formed by filing articles of organization with the state in which it is formed. It is a hybrid between a partnership and a corporation. It combines the primary advantage of a partnership--ease of formation and maintenance, and favorable taxation--with the key advantage of a corporation--limited liability protection for its owners. The owners of an LLC are typically called members. Individuals, corporate entities, tribes and tribal entities can be members of an LLC. Most states allow an LLC to have only one member. Like a partnership, its income is only taxed once. The tax attributes are passed down from the entity to its owners in proportion to their ownership interest--known as "pass through tax treatment." Therefore, a tribe’s share of income from a LLC would not be subject to federal income tax.

D. **Success Factors**

When choosing a business structure, there are many things a tribe should consider regarding business issues and tribal governmental issues. One of the key factors is how to preserve tribal control while also insulating business decisions from tribal governmental decisions or tribal politics. Another critical factor for tribes is how to preserve tribal assets and limit exposure to business liabilities. Other factors are: how to effectively manage the entity, how to maximize tax benefits, how to minimize financial risks, the location of business operations--on or off the reservation, what assets will be pledged, how the business will be capitalized, which structure enables the preferred method of equity or debt financing, and the requirements of one’s business partner or lender.

This Handbook will look at key attributes to consider as you determine the ideal structure for your business. These include:

- Organizational considerations
- Sovereign immunity
- Legal Liability
- Federal tax treatment
- Financing considerations.

As you learn about each entity and evaluate these factors, you will be able to see how these factors all come together to create a business structure which best meets your needs. You
will see which businesses fit best with which entity type. You will have a working knowledge of the impact each of these factors will have on your business. When looked at together, these factors will point to the best entity choice for a particular tribal business enterprise.
II.

TRIBAL GOVERNMENT ENTITIES

A. Unincorporated Agencies, Divisions and Instrumentalities

1. Description and Examples

Tribes are self-governing sovereigns with traditions of self-government that pre-date the Constitution. Accordingly, Tribal governments do not derive their powers or sovereignty from the United States. The sovereignty of tribes is recognized in the Commerce Clause and Treaty Clause of the U.S. Constitution. Tribes, generally exercise powers of self-government that are derived from their status as separate and distinct sovereigns.5

Tribes exercise inherent rights of self-government including the power to engage in business and commercial activities. Many tribes operate under traditional forms of government, or by adopting constitutions or codes under tribal law allowing them the power to engage in business and commercial activities.6

In addition, in 1934, Congress enacted the Indian Reorganization Act (IRA) to encourage economic and political self-determination by permitting tribes to organize their tribal governments under constitutions adopted pursuant to Section 16 of the IRA. Tribes had the option to accept or reject the IRA. Tribes that chose to organize their government under Section 16 of the IRA adopted a Tribal Constitution that was reviewed and approved by the Secretary of the Interior. Alaska and Oklahoma tribes were originally excluded from the IRA, but the provisions were later extended to Alaska Natives and similar provisions were extended to some Oklahoma tribes.7

Tribal constitutions adopted under Section 16 of the IRA typically established a system of centralized government with a chief executive, usually a Tribal Chairman or President, a legislature, usually a Tribal Council, a Tribal Business Committee, or Board of Directors that was vested with legislative and executive powers, and a weak judiciary.

Tribal governments often directly control or participate in business activities through unincorporated instrumentalities of the tribe. These are often referred to as an economic arms of the tribe. These instrumentalities or arms of tribal government are not considered to be distinct legal entities. Examples are tribal casinos, tribal enterprises, and tribal utilities.

2. Organizational Characteristics

Formation--Unincorporated instrumentalities of a tribal government are formed under tribal law for commercial purposes and share the same legal characteristics of the tribal government because they are not separate legal entities. A tribe’s constitution and
by-laws or codes may provide tribal governments with the power to create and operate subordinate economic entities. These entities are generally established by tribal resolution or by tribal ordinance.

Management--These entities are usually directly controlled by the tribal government and its tribal council to serve as the development arm of the tribe. Sometimes a tribal enterprise may have a board of directors, but it is usually comprised of tribal council members. An unincorporated instrumentality often has a manager in charge of its day-to-day operations.

General Characteristics--Tribes have operated ski resorts, farming ventures, cigarette sales and gaming through unincorporated tribal entities. There is no separation of the business entity from the tribal government body and such enterprises do not hold assets or property separately from the tribe. Land and assets used by the unincorporated enterprise are held by the tribal political body and are not specifically conveyed or set aside. In some instances, there are no separate bank accounts, separate directors, or assets. The enterprise is wholly-owned by the tribe. The tribal council is typically involved in day-to-day management decisions either directly or indirectly.

For example, the Navajo Nation formed the Navajo Forest Products Industries (NFPI) which is wholly-owned and operated by the tribe on the Navajo Reservation. NFPI is an instrumentality or arm of the tribal government. The enterprise manufactures wood products. NFPI conducts day-to-day operations and is supervised by a general manager who is appointed and responsible to a nine-member management board. The board is appointed by the Navajo Tribe’s advisory committee which is ultimately responsible for the operation of the business enterprise. The advisory committee is comprised of the Navajo Tribal Council.

Researchers with the Harvard Project have described the unincorporated tribal instrumentality as a Council-Run Model. See adapted diagram below.
3. **Sovereign Immunity and Liability Issues**

**Sovereign Immunity**—As a matter of federal law, judicial relief to enforce contracts or agreements against an Indian tribe in state or federal court is permitted only where Congress has authorized the suit or the tribe has waived its immunity. Sovereign immunity protects the limited and irreplaceable tribal resources from large judgments and safeguards tribal self-governance. The doctrine of sovereign immunity recognizes that a tribe’s sovereign status is directly related to its ability to generate revenues through the regulation of commercial activities on the reservation. The ability to contract impacts a tribe’s fiscal resources by binding or obligating the funds and assets of the tribe. Therefore, courts have found that corporate contractual provisions are economic matters that directly affect a tribe’s right to self-government. From this perspective, a tribal business entity under certain circumstances can be determined to be a tribe’s alter ego and share the same attributes of tribal sovereignty as the tribe such as sovereign immunity from suit in order to protect tribal assets and property.

Indian tribes possess the common-law sovereign immunity from suits similar to that enjoyed by other sovereigns. Tribal enterprises which serve as subordinate economic tribal entities created by an Indian tribe possess attributes of sovereignty such as sovereign immunity. Consequently, they cannot be sued absent a clear waiver of sovereign immunity. Indian tribes are generally immune from suits on contracts that involve governmental or commercial activities on or off a reservation. A business entity that is an instrumentality or arm of the tribe or an unincorporated entity of a tribe
can share the same attributes of the tribe including sovereign immunity from suit. When a tribe establishes an entity to conduct certain activities, the entity is immune from suit if it is functioning as an arm of the tribe such that its activities are appropriately deemed to be those of the tribe.\textsuperscript{17} Courts have rejected attempts to limit sovereign immunity to the governmental activities of a tribe and have found tribes to be immune from suit for business activities if operating as an arm of the tribe.\textsuperscript{18} A tribal instrumentality or unincorporated enterprise of a tribal government, however, can not unilaterally act to waive tribal sovereign immunity except in accordance with tribal law.\textsuperscript{19}

Tribal commercial enterprises cover a broad range of activities that include gaming, smoke shops, convenient stores, business parks and other enterprises. Many courts have found that subordinate economic entities of the tribe created for commercial purposes share the same immunity as the tribe itself.\textsuperscript{20}

Tribal sovereign immunity can create uncertainty and risks for would-be investors or business partners. For instance, agreements may not be enforceable where one party (e.g., a tribe or tribal entity) is immune from suit.

In many disputes regarding tribal commercial activities, an issue is raised regarding whether a tribe has waived sovereign immunity. An Indian tribe cannot be sued unless there is a clear waiver of sovereign immunity by the tribe itself or a clear abrogation of immunity by an Act of Congress.\textsuperscript{21} A tribe may waive immunity by contract or agreement, by tribal ordinance, by resolution, or by its corporate charter. Such waiver must be in accordance with valid tribal law, such as a constitution and by-laws, by tribal code, or other provision which authorizes the waiver and permits tribal officials to execute contracts.\textsuperscript{22}

Tribes have granted limited waivers of sovereign immunity. Waivers can be limited in a number of ways. A waiver can be limited to (1) a specific tribal asset or enterprise revenue stream, (2) a specific type of legal relief sought by performance of the contract and not money damages, (3) a claim limited to the amount borrowed, or (4) a specific enforcement mechanism, such as court or arbitration.

The Supreme Court has recently construed an arbitration clause contained in a contract executed by a tribe as constituting a clear waiver of sovereign immunity.\textsuperscript{23} In this instance, the tribe entered into a contract that did not contain an express waiver of sovereign immunity or express consent to state court jurisdiction. Rather, the contract contained an arbitration provision in which the tribe agreed to arbitrate claims under the contract, agreed to the governance of state law, and agreed to the enforcement of the arbitrator award in "any court having jurisdiction." The Court concluded that the tribe waived immunity from suit and enforcement of the arbitration award with requisite clarity.

When a tribe engages in commercial activities as an unincorporated arm of the tribal government, it will need to address questions regarding tribal sovereign immunity. When a tribe enters into a commercial endeavor it is investing its time, energy, and
resources, and its business partner is doing the same. It is a reasonable business practice for all parties to want to protect their business investments. Tribal sovereign immunity can prevent a lender or business partner from protecting its investment. Whenever a tribe or an unincorporated instrumentality of the tribe enters into a contract or agreement, sovereign immunity is implicated. A lender or business partner will likely seek a method to protect its investment through a limited waiver of sovereign immunity. The decision to waive immunity is a governmental decision.

One of the disadvantages of forming a tribal business entity as an unincorporated instrumentality of a tribal government is that the sovereign status of the tribe may impede a tribe’s ability to obtain credit and financing for its business transactions if agreements are not enforceable through judicial action. Also, if a tribe does waive its immunity from suit through a tribal instrumentality, it may subject the assets of the tribe to potential liability for the obligations of the tribal instrumentality. Since there is no separate legal entity conducting business, the assets and obligations of the tribe are intermingled with the business.

4. Tax Treatment

Tax Treatment--There is no federal statutory provision that exempts Indian tribes from federal income taxation. However, the Internal Revenue Service has concluded that federally recognized tribes and their federally-chartered corporations are not subject to federal income taxes. With respect to tribal governments, the IRS in Revenue Ruling 67-284 based its conclusion on the fact that tribes are political bodies that Congress did not intend to include within the meaning of taxable entities subject to the income tax provisions of the Internal Revenue Code regardless of whether the business activity is inside or outside of Indian-owned lands. With respect to tribal federally-chartered corporations, the IRS takes the view that no taxable entity separate from the tribe exists. Any income earned by a tribe is not subject to federal income tax regardless of whether a tribal business activity is on or off Indian-owned lands. The federal tax treatment of a tribal enterprise will depend on how a business is structured.

The IRS has generally treated an unincorporated instrumentality or business operated directly by a federally recognized tribe as not subject to federal income tax, again because it is not considered to be an entity separate from the tribe itself. As a note of caution, there is no per se exemption from federal income taxation when a tribe organizes as an "instrumentality." To be considered a nontaxable entity, the instrumentality must be operating as an arm of the tribe, and not organized as a separate legal entity. In determining whether an entity qualifies as a government instrumentality, the IRS generally looks at the following six factors:

1) whether the organization is used for a governmental purpose and performs a governmental function;

2) whether performance of its function is on behalf of one or more governmental units (e.g., a state, a tribe or political subdivision);
3) whether there are any private interests involved, or whether the governmental unit has the power and interest of an owner;
4) whether control and supervision of the organization is vested in a public authority or authorities;
5) whether express or implied statutory or other authority is necessary for the creation and/or use of the organization, and whether this authority exists;
6) and the degree of financial autonomy of the entity and the source of its operating expenses.\textsuperscript{26}

If it meets this multi-factor test, an instrumentality will qualify for tax benefits reserved to governmental entities--such as the ability to receive charitable contributions or to issue tax exempt bonds.

Recognizing that for some purposes tribal governments have similar qualities to state governments, Congress passed the Indian Tribal Governmental Tax Status Act in 1982 to provide similar governmental tax treatment to tribes.\textsuperscript{27} The Tribal Governmental Tax Status Act, codified as section 7871 of the Internal Revenue Code, provides that federally recognized tribes are treated like states for purposes of a number of tax benefits, including:

- Charitable contributions are tax deductible
- Gifts and bequests are deductible
- Tax exempt bonding authority
- Exemption from certain excise taxes
- Treatment as a government under the private foundation excise tax rules.

Although Code Section 7871 did not codify the basic tax immunity of tribal governments, the legislative history indicates that Congress was aware of the Internal Revenue Service’s position and did not wish to alter it.

5. Financing Considerations

Two major considerations in obtaining credit through conventional lending are: (1) the lenders need to be able to enforce an agreement, and (2) they need to protect their investment in the event of a default. A tribe operating an enterprise as an arm of the tribal government may have difficulty obtaining conventional financing.

**Ability to enforce agreements**--Lenders will be reluctant to provide credit if they are not certain that they can enforce their contract against a tribal enterprise that is an arm of the tribe because, like the tribe, it will be immune from suit. A tribe and lender can address this in a number of ways. The tribe can waive sovereign immunity for a particular transaction. Or, as addressed later in this Handbook, the tribe can form an
entity separate from the tribal governing body that does not have sovereign immunity from suit or which has been vested with limited sovereign immunity.

Collateral and Security Interest--In addition to sovereign immunity concerns, a conventional lender will also want collateral or a security interest so that its investment is protected if there is a default or the enterprise is not successful. An enterprise operating as an unincorporated instrumentality of the tribe and its governing body will not have separate assets or property to pledge as collateral. Rather, tribal assets would have to be pledged and there will be no limitation of liability.

Loan Guarantee Programs:

U.S. Department of the Interior Capital Investment Program. The Department of the Interior, Office of Indian Energy and Economic Development ("IEED") has an "Indian Affairs Loan Guaranty, Insurance, and Interest Subsidy Program" with two key loan programs. The first is a loan guaranty program in which a loan from a lender to a Tribe or an Alaska Native group may be provided a guaranty of up to 90% of a loan if the business activity will contribute to reservation economic development.

The IEED does not make direct loans. Loans may be made to finance Indian-owned businesses organized for profit, provided that Indian ownership constitutes at least 51% percent of the business. In 2006, the maximum loan amount that could be guaranteed for tribes is $12 million dollars. Each year Congress determines the limit on the total amount that IEED may guaranty. In 2006, the Office of IEED had $107 million dollars. In recent years, the Office of IEED has exhausted its limit before the end of the fiscal year. In some circumstances, IEED may subsidize the interest rate guaranty under the program by paying the difference between the yield on outstanding obligations of the United States of comparable maturity and the rate the bank is charging the Indian borrower.

The second is a new loan insurance program that may provide a more efficient process for tribally-owned firms to obtain loans under the $250,000 amount and at a lower cost than the IEED loan guaranty program. Under the insurance program, a bank that has been certified for the program may issue loans up to $250,000 to tribal firms without obtaining IEED approval. The IEED fees for this program are 1% less than the guaranteed loan program. Under this program, IEED will insure the lesser of 90% of the loan or 15% of the total dollar amount of the bank's loan portfolio issued under the insurance program.

U.S. Department of Agriculture ("USDA") Business & Industry ("B&I") Loan Guarantee Program. The Business & Industry Loan Guarantee Program is intended to improve, develop, or finance business, industry, and employment, to improve economic conditions in rural communities. The guarantee fee charged, which may be passed on to the borrower, is two percent of the original loan amount. The fee may be reduced to one percent if certain criteria are met. Eligible borrowers include Indian tribes or federally recognized groups.28
Loan proceeds can be used for machinery and equipment, buildings and real estate, working capital, and certain refinancing. Generally, the maximum amount available to a borrower is $25 million; however, the maximum amount for rural cooperatives processing value-added commodities is $40 million. The USDA will guarantee up to 90 percent of the amount of the loan under $2 million, 80 percent of a loan between $2 million and $5 million, 70 percent of a loan over $5 million, and 60 percent of a loan over $10 million.

**Small Business Administration ("SBA") 7(a) Program.** The SBA 7(a) Program provides commercial loan guarantees to American small businesses for general business purposes. Loan proceeds may be used for working capital, machinery and equipment, furniture and fixtures, land and buildings, leasehold improvements, and certain refinancing. The loan term is up to 10 years for working capital, and up to 25 years for fixed assets.

7(a) loans are only available on a guaranty basis. This means they are provided by lenders who choose to structure their own loans by SBA's requirements and who apply and receive a guaranty from SBA on a portion of this loan. The SBA does not fully guaranty 7(a) loans. The lender and SBA share the risk that a borrower will not be able to repay the loan in full. The guaranty is a guaranty against payment default.

Tribally-owned businesses may be eligible to receive loan guarantees if they meet other SBA requirements regarding size, nature of the business, use of proceeds, and lack of available credit elsewhere. SBA regulations provide that businesses deriving more than one-third of their gross annual revenue from "legal gambling activities" are ineligible to for SBA loans.

**Tax-exempt Bonding.** Section 103 of the Tribal Governmental Tax Status Act permits tribal governments to issue tax exempt bonds. When a tribe issues tax exempt bonds, the investors in such bonds are able to earn interest free of tax. Thus, all other factors being equal, such bonds should yield lower interest rates than taxable debt. Bond financing (whether taxable or tax-exempt) also has the advantage of allowing the borrower to spread repayment of principal and interest over a longer period.

Only Indian tribal governments and their political subdivisions are qualified issuers of tax exempt debt. Furthermore, the IRS has ruled privately that certain entities that qualify as "integral parts" of the tribe may also issue such debt. In addition, the IRS has ruled that Indian entities qualifying as an "instrumentality" of one or more government units may use tax exempt financing, and such use will not constitute a "private business" use.

In addition to meeting these tests, which focus on the identity of the person issuing the bonds (or on whose behalf the bonds are issued), all tribal tax-exempt debt must finance facilities that serve an "essential governmental function." Section 7871 does not define an essential government function, but Section 7871 states that it does not include functions not customarily performed by state or local governments. The
interpretation of the "essential governmental function" test has spawned a number of controversies between the IRS and tribes. Recently, the IRS announced a proposed rulemaking to bring more clarity to this area of the law.\textsuperscript{33}

**Tax Credit Financing.** The Energy Policy Act of 2005 includes authority for nonprofit utilities and governmental entities, including tribal governments, to issue tax credit bonds to finance the cost of renewable energy projects--known as Clean Renewable Energy Bonds ("CREBs"). These entities may issue a total of up to $800 million in tax-credit bonds between January 2006 and the end of December 2007 to finance solar, wind, biomass, landfill gas, geothermal, and small irrigation power facilities that generate electricity. No more than $500 million of the CREBs can be allocated for projects of government entities. The project must be owned by a governmental entity or non-profit entity. Initial applications for allocation of these bonds were due April 26, 2006.

H.R. 6408, the Tax Relief and Health Care Act of 2006, recently extended and expanded the availability of CREBs. Section 202 of the bill authorizes an additional $400 million of CREBs and extends the authority to issue such bonds through the December 31, 2008. The bill is expected to be signed into law by President Bush. Assuming that the bill is enacted, it is expected that there will be a new round of applications that eligible issuers may submit.

**Project Financing/Non-Recourse Debt Financing.** Project financing involves non-recourse financing of the development and construction of a particular project in which a lender looks primarily to the revenues expected to be generated from the project for the repayment of its loan and to the assets of the project as collateral for its loan rather than the general credit of the project owner or developer. Capital-intensive projects requiring large investment of funds such as power plants, pipelines, and power generation facilities, are increasingly funded using project finance. Developers of these projects are frequently not sufficiently creditworthy to obtain traditional financing or are unwilling to take the risks and assume the debt obligations for traditional financing.

Project financing permits the risks associated with such projects to be allocated among a number of parties at levels acceptable to each party. For example, for an energy generation facility, there usually has to be a long-term off-take agreement or power sales agreement and the purchaser has to have good credit.\textsuperscript{34} A tribe developing wind power generation may obtain a power sales agreement from a utility who agrees to purchase the power generated by the project for a stated term. Any utility that agrees to purchase the product must have good credit. The power sales agreement and the anticipated revenues could be pledged as security to obtain a loan for the construction and development of the project. The tribal developer would not have an obligation to make payments on the project loan if the revenues generated by the project are insufficient to cover the loan payments. This type of financing allows the developer to finance the project on a highly leveraged basis. Often, projects are financed using 80 to 100 percent debt financing. A developer’s funds are at less risk as it permits a developer to finance the project without diluting its equity investment in the project.
6. **Advantages and Disadvantages**

**Advantages and Disadvantages**--It can be challenging for a tribe that chooses to operate and manage a commercial enterprise through an unincorporated arm of the tribe. Since an unincorporated commercial enterprise of the tribe is acting as an extension of the tribe it is not set up as a separate legal entity from the tribe itself. The tribe will enter into a contract in its own name. The assets and property of unincorporated enterprise is not conveyed to a separate legal entity and can not be separately pledged as collateral. Thus it is more difficult to minimize the financial risks of the tribe by segregating the assets of the unincorporated enterprise.

The advantages of operating a business as an unincorporated instrumentality of the tribe include:

- Easy to form since it is formed as an arm of the tribal government--no need to set up a separate legal entity
- Management is centralized through tribal governmental officials
- Entity will have the same privileges and immunities as the tribal government including tribal sovereign immunity
- Not subject to federal income tax
- Section 81 approval by the Secretary of the Interior required if contracts or agreements encumber Indian land for a term of 7 years or more.

Disadvantages include:

- Politics and business not separated
- Assets and liabilities of the enterprise are not segregated from governmental assets
- Wholly-owned tribal entity--would preclude equity ownership in enterprise by outside investors.

A major disadvantage of an unincorporated instrumentality of the tribe is that it does not separate politics from the day-to-day business operation of the tribe and the tribe assumes liability for all of the obligations and liabilities of the enterprise. This can result in micro-managing of a business enterprise which may hinder the tribal council’s ability to set overall strategic economic development objectives.
Case Study—Mohegan Tribal Gaming Authority

In 1995, the Mohegan Tribe of Indians of Connecticut, a federally-recognized tribe, adopted a tribal ordinance that established the Mohegan Tribal Gaming Authority as an instrumentality of the tribal government. The Authority was created under an ordinance established under tribal law.

The Authority is governed by a Management Board comprised of the same nine members that serve on the Tribal Council. The nine-member Tribal Council serves four-year staggered terms; any change to the Tribal Council results in a corresponding change to the Management Board. The Authority is managed by a CEO who is hired by the Management Board. The CEO makes the day-to-day business management decisions for the Mohegan Sun.

The Authority has been granted the exclusive power to conduct and regulate gaming activities on the existing reservation of the Tribe and non-exclusive authority to conduct activities elsewhere. In 1996, the Authority opened the Mohegan Sun casino and entertainment center on their reservation. In 2005, the Authority purchased a racing facility and five off-track wagering facilities in Pennsylvania, and formed the Mohegan Sun at Pocono Downs.

The Authority has wholly-owned subsidiaries: Mohegan Basketball Club LLC, Mohegan Ventures-Northwest LLC, and Mohegan Commercial Ventures PA, LLC. As part of its diversification efforts, Mohegan Ventures-NW owns a 54.15% in Salishan-Mohegan LLC, formed with an unrelated third party to participate in the development and management of a casino to be owned by the Cowlitz Indian Tribe in Washington. Both Mohegan Ventures-NW and Salishan Mohegan are designated as unrestricted subsidiaries of the Authority and are not required to be guarantors of the Authority’s debt obligations.

Eagle-Tech Systems (ETS) is a wholly-tribally owned computer services company. Originally started in 1972 as an internal information technology department by the Warm Springs tribal government, it was renamed ETS in January 2004. The ETS office is located on the Warm Springs Indian Reservation in North Central Oregon.

The Confederated Tribes of the Warm Springs Reservation is a confederation of three Indian tribes organized pursuant to the Indian Reorganization Act of 1934 (IRA). The Tribe has both a Constitution and Bylaws approved pursuant to Section 16 of the Act and a federal corporate charter issued pursuant to Section 17 of the Act. In both capacities it is governed by an 11 member tribal council. The Tribe has approximately 4,500 members. Its lands include 640,000 acres within the reservation boundaries, and some thousands more acreage off reservation within its original lands ceded to the U.S. Government in 1855. It has a variety of enterprises including a lumber mill, vacation resort, casino, composite materials manufacturing plant, museum, construction enterprise, credit enterprise, and hydroelectric power generation enterprise. Some of these are formed under the federal corporate charter and others, like Eagle-Tech Systems (ETS), are formed pursuant to provisions of the constitution.

Eagle-Tech Systems is not a corporation, partnership, LLC, LLP, sole proprietorship or other form of legal organization commonly used off the reservation. Rather, it is a unique entity formed under the Tribal Constitution that has many of the attributes of the most common forms of business organizations. The Tribal Constitution empowers the Tribal Council "to charter subordinate organizations for economic purposes and to regulate the activities of all cooperative associations of members of the Confederated Tribes." Pursuant to this provision the Tribal Council, by resolution, has chartered Eagle-Tech Systems as a "subordinate organization for economic purposes." Under the charter, it is governed by a board of directors appointed by the Tribal Council. It is managed on a day-to-day basis by a General Manager selected by the board of directors. As a legal entity, it can be described as a "subordinate organization of the Warm Springs Tribe chartered for economic purposes by the Tribal Council of the Confederated Tribes of the Warm Springs Reservation pursuant to the provisions of its Constitution adopted pursuant to the provisions of Section 16 of the Indian Reorganization Act of 1934".

Source: Eagle Tech Systems
B. Political Subdivision of Tribal Government

Political subdivisions are increasingly utilized by Indian tribal governments as quasi-business entities because of the close link between economic development (a governmental function) and tribal ownership and conduct of businesses. In some cases, such subdivisions are being formed as Economic Development Authorities that serve two functions: (1) as holding companies for business entities owned by the tribe; and (2) as regulatory bodies for business operations within the tribe's jurisdictional area. In other cases, political subdivisions are utilized to own and operate a specific enterprise or activity that has both a governmental and a business aspect to it, such as energy development, gaming or housing.

1. Brief Description and Examples

A political subdivision of an Indian tribal government is a unit of the government that:

- Is, to some degree, separate from the government itself
- Is created under tribal law to fulfill a substantial governmental function of the government
- Has been delegated a sufficient amount of one or more recognized sovereign powers of the tribe.

Recognized sovereign powers include, for the purpose: (1) the power to tax; (2) the power of eminent domain; and (3) a police or regulatory power.

This past year, the IRS ruled that a tribal business development authority (the "Authority") may constitute a political subdivision of a federally recognized Indian tribe (the "Tribe"). In Private Letter Ruling ("PLR") 200635002, the Tribe, through its Tribal Council, established the Authority as a political subdivision of the Tribe. Authority was given the power to impose and collect (1) business income or franchise taxes, sales and use taxes, and other business-related taxes on any persons (limited to business entities chartered by the Tribe), transactions, or activities within Tribe's taxing jurisdiction, and (2) service and licensing fees on business enterprises operating within Tribe's taxing jurisdiction.

The Tribe retained significant control over the Authority even though it was a separate entity. For example, it provided that all five members of Authority's governing board could be removed by the Tribal Council at any time with or without cause. Furthermore, the Authority's capital and operating budgets were subject to Tribal Council approval before they became effective, while financial balance sheets and quarterly reports were required to be filed with the Tribal Council.
The IRS found the Tribe effectively delegated all the power to tax, and one or more of the substantial governmental functions within the meaning of section 7871(d) of the Code. Therefore, the IRS held Authority will be treated as a political subdivision of Tribe under section 7871 of the Code.35

Other examples of political subdivisions that have been recognized as such by the IRS and the Bureau of Indian Affairs ("BIA") include the following:

- A reservation infrastructure development authority or entity
- Numerous tribal housing authorities, including an intertribal housing authority
- An intertribal river protection and fish commission
- An industrial development commission charged with the administration and development of economic activities within tribal jurisdiction.

In certain instances, the IRS has ruled that a tribal entity did not qualify as a political subdivision. For example, the IRS ruled in the late 1990s that a state-chartered non-profit health entity was not a political subdivision of an Indian tribe because there was no evidence tribe had delegated any sovereign powers to the entity. Conversely, the IRS ruled in the mid-1980s that a tribal tax commission was not a political subdivision--not because it lacked sovereign powers, but because it was an "integral part" of the government itself.36

2. Organizational Characteristics and Requirements

Most entities that qualify as political subdivisions of a tribal government are created under tribal law (generally, through a special purpose ordinance or legislative act) for a governmental purpose. Although political subdivisions are ultimately controlled by the tribe and its governing body, such subdivisions generally have their own governing body--whether it be a board of directors, a commission or other type of decision-making body. As noted above, the hallmark of a political subdivision is its ability to exercise sovereign powers delegated to it by the tribe.

Section 7871 of the Internal Revenue Code provides that a subdivision of an Indian tribal government shall be treated as a political subdivision of a state if (and only if) the IRS determines (after consultation with the Department of the Interior) that such subdivision has been delegated the right to exercise one or more of the substantial government functions of the Indian tribal government. The legislative history provides that sovereign powers of an Indian tribal government include the power to tax, the power of eminent domain, and police powers (such as control over zoning, police protection, and fire protection).37 Police powers generally include the power to promulgate and enforce regulations within an entity's scope of authority.

Following passage of the Indian Tribal Government Tax Status Act in 1982, the IRS promulgated two revenue procedures relevant to tribal political subdivisions. The
Revenue Procedure 84-36--lists all of the tribal entities that the IRS determined to be political subdivisions at that time. The second--Revenue Procedure 84-37--provides specific procedures that must be followed by any tribe seeking to qualify an authority or subordinate entity as a political subdivision.\footnote{38}

**Comment:** Tribal political subdivisions are not required by the IRS or BIA to obtain official recognition of their status for federal income tax purposes, but if a tribal political subdivision intends to be treated like a political subdivision of a state for all of the enumerated federal tax benefits in Section 7871 (e.g., authority to issue tax-exempt bonds, entitlement to various excise tax exemptions, ability to receive tax-deductible charitable contributions), it must request an IRS ruling following specific IRS procedures.

Under the procedures set forth in Revenue Procedure 84-37 as updated annually by subsequent IRS revenue procedures,\footnote{39} the first step in obtaining an IRS ruling on the political subdivision status of a tribal entity is to secure a letter from the Department of the Interior ("DOI") verifying that the Tribe has delegated a substantial government power to the entity. The DOI letter may be obtained from the Solicitor's Office at the Department. There are no regulations or other administrative pronouncements on the format for the DOI letter request, other than the substantive guidance found in the IRS revenue procedures. The request should demonstrate that the subdivision has been validly established under tribal law and that the tribe's governing body has delegated one or more of the following three sovereign powers to the entity: (1) the power to tax; (2) the power of eminent domain; and (3) a police power. There is no filing fee for requesting the DOI determination letter, but such determinations generally take at least 90 days to obtain.

Once the DOI letter has been issued, the IRS ruling request may be filed. Even though the IRS is not required to make a substantive determination of its own, the IRS charges the normal private letter ruling "user fee" for political subdivisions determinations. As of February 1, 2006, the user fee was $10,000. This type of private letter ruling will normally be processed in 90 to 120 days if all of the technical requirements are met.

3. **Sovereign Immunity and Liability**

Sovereign immunity generally extends to political subdivisions of Indian tribal governments. Like an instrumentality, a tribal political subdivision shares the same attributes of tribal sovereignty as the tribe. Sovereign immunity is essential in order to protect tribal assets and to safeguard tribal self-governance.

When a political subdivision is utilized for economic development purposes, there are likely to be occasions in which the subdivision finds it useful or necessary to execute a limited waiver of sovereign immunity. Thus, the tribal ordinance establishing the
subdivision should provide that the subdivision may execute any limited or transaction-specific waiver of its sovereign immunity. Limitations on the subdivision's exercise of such a right typically include (1) requiring advance approval of the Tribe's governing body, and (2) clarifying that a subdivision's waiver of immunity does not in any way waive the tribe's immunity. In addition, in establishing a subdivision, it is useful to provide that the subordinate entity's immunity from suit does not extend to legal actions against it or its officers or directors brought by the tribe itself.

4. Tax Treatment

   The IRS has ruled that the income earned by a state, a political subdivision of a state, or an integral part of a state or political subdivision "is generally not taxable in the absence of specific statutory authorization for taxing such income."\textsuperscript{40} As noted above, the IRS has taken this same approach to the taxation of income earned by Indian tribes, their unincorporated businesses, and their section 17 corporations.\textsuperscript{41} The IRS has also ruled privately that a political subdivision of an Indian tribe was not required to file income tax returns.\textsuperscript{42}

   \textit{Comment: Although the relative dearth of binding IRS authority on the income tax treatment of tribal political subdivisions is troubling, the current practice of the IRS is to treat political subdivisions the same as the tribe—so long as they qualify as such by having been delegated substantial governmental powers.}

Section 7871 treats Indian tribal governments and their political subdivisions like state governments for specific tax purposes. The Internal Revenue Code provides a relatively large number of tax benefits for state and local governments. Not all of these benefits are extended to tribal governments. Under Section 7871, the following benefits are available to tribal governments and their political subdivisions:

- Tax deductibility of charitable contributions for income, estate and gift tax purposes
- Certain governmental exemptions from specific excise taxes levied on fuels, manufactured goods, communications, and certain highway vehicles (all contingent on the purchase or sales transaction involving the exercise of an "essential governmental function")
- Tax deductibility of tribal taxes
- Authority to issue tax-exempt bonds for facilities that serve an "essential governmental function"
- Certain health and retirement annuity plan purposes (but not the treatment of tribal pension or retirement plans generally as "governmental" plans)
- Excise taxes rules related to excess lobbying expenditures and private foundations.
In addition, under section 7871(a)(5), Indian tribal governments or their subdivisions that form colleges and universities are--like state colleges and universities--subject to the unrelated business income tax or "UBIT" (even through state political subdivisions would not generally be subject to the UBIT tax).

As noted above, in order to qualify for the tax benefits enumerated in Section 7871, a political subdivision of a tribe must be recognized by the Internal Revenue Service as an entity that has been delegated one or more sovereign powers of an Indian tribal government.

5. Financing Considerations

One of the major advantages of establishing a political subdivision for economic development or business activities is that such an entity can be both the borrower and the issuer in a tax-exempt financing. When the subdivision, and not the tribal government itself, is the issuer/borrower, overly invasive disclosure of tribal financial records may be avoided.

Where the facilities or operations to be financed do not meet the essential governmental function test under section 7871 for tax-exempt bond financing, the political subdivision may seek or arrange other types of financing, such as:

- Government-guaranteed loans
- Taxable bond issuances
- Private placements
- Commercial bank financing.

In addition, Indian tribes or their political subdivisions may seek specialized types of tax-credit financing (such as the "clean renewable energy bonds" recently authorized in the Energy Policy Act of 2005) and extended by the Tax Relief and Health Care Act of 2006.43

These and other financing options are discussed in detail in Section II.A.5.

6. Advantages and Disadvantages

Advantages of conducting economic development and business activities through a political subdivision include the following:

- Relative certainty of federal tax treatment
- Likely retention of state tax immunity
- Retention of sovereign immunity (except where waived or limited for specific purposes)
• Ability to form the equivalent of a corporate board with a governmental focus
• Use of the subdivision as both a regulatory body and as a holding company for subordinate and separately organized business entities.

Disadvantages of conducting economic and business activities through a political subdivision include the following:

• Time and expense associated with the formation of the entity, including the requisite federal agency approvals that must be obtained (first by BIA, and then IRS)
• Political subdivisions do not have all of the flexibility associated with ordinary business entities, such as corporations and LLCs
• Certain business partners may not be comfortable dealing with any type of governmental entity.

In sum, once an economic development or other authority is established as a political subdivision, it makes an excellent platform for both conducting and overseeing business operations. However, its formation is not likely to be quick and easy. Implementing this option requires careful advance planning and a minimum of six months to obtain the requisite agency approvals.
III.

TRIBAL CORPORATIONS

A. Tribally-Chartered Corporations

Tribally chartered corporations have been utilized with increasing frequency by Indian tribal governments to conduct various types of economic development and business activities. One compelling reason for their use is that they are relatively easy to establish compared to federally chartered corporations (e.g., corporations organized under section 17 of the Indian Reorganization Act or section 3 of the Oklahoma Indian Welfare Act). In addition, tribally chartered corporations, unlike state chartered entities, are considered to be largely exempt from state regulation—depending, of course, on the locus of their operations and whether they are wholly owned by the tribe. They are also more likely to be immune from taxation than state-chartered corporations are. However, the federal tax treatment of such corporations is currently the subject of a pending IRS guidance project, and thus remains somewhat uncertain. In addition, the immunity from suit of such corporations depends on the facts and circumstances of their creation, ownership and operation, and can be difficult to predict.

1. Brief Description and Examples

A tribally chartered corporation is a corporation that is organized under a tribal statute or code or pursuant to a resolution of an authorized tribal legislative body. A corporation is a business entity that has the following characteristics: (1) limited liability (i.e., the liabilities of the corporation do not automatically become liabilities of the corporation's owners); (2) transferability of ownership interests; (3) centralized management, generally in the form of a board of directors; and (4) continuity of life (i.e., it exists until formally dissolved). By definition, a corporation has separate legal existence as an entity distinct from its owners or shareholders.

The tribe under whose laws a corporation is organized will typically issue a charter or certificate of organization. Such a corporation may be organized as a for-profit or nonprofit corporation. Ownership may be evidenced by shares (in the case of a stock corporation) or simply by governance control (non-stock corporation). Although for purposes of this chapter, we are focusing on tribally chartered corporations that are wholly-owned by an Indian tribe, such corporations may be owned in whole or in part by third parties so long the tribe's laws authorize the formation of such corporations.

The legal characteristics, capabilities and limitations of tribally-chartered corporations are all determined under the law of the chartering tribe. In some cases, such law may spell out the corporation's powers and limitations in great detail—especially where the tribe has taken the time to draft and promulgate a corporation code. In other instances, the tribal law merely establishes an entity for a specific purpose, and leaves the details to the organization's articles and bylaws.
Examples of tribally chartered corporations include the following (drawn from IRS rulings, reported cases and other sources):

- A tribally chartered college
- A tribal law corporation (or an instrumentality with corporate characteristics) used to conduct the gaming operations of the tribe
- A nonprofit corporation chartered by a tribe to provide educational and health programs for its members
- A tribally chartered corporation used as a holding company for a variety of economic development and business entities.

Numerous tribes have established and utilized tribal corporations for a wide variety of purposes.

2. Organizational Characteristics and Requirements

The organizational characteristics and requirements for a tribally chartered corporation will vary according to the applicable law of the tribe. Several tribes have adopted very detailed corporation codes (in some cases, with specific provisions for for-profit and nonprofit corporations), while others provide for the organization of tribal corporations on a more ad hoc basis. However, there are common characteristics and organizational procedures for forming and managing corporations that are found in many tribal statutes.

Formation--To form a tribally-chartered corporation, the incorporators must generally select a name and draft articles of incorporation. Most corporate codes require the following items to be included in articles of incorporation of any type of corporation:

1) the name of the corporation;
2) the term or period of existence of the corporation (which may be perpetual);
3) the purpose(s) for which the corporation is organized (with an eye toward consistency with whatever the tribe's corporation code define as lawful corporate purposes);
4) laws regulating the governance of the corporation, including the election of directors and rights of shareholders;
5) the address of the corporation's initials registered office and the name of its initial registered agent at such address;
6) the number of persons constituting the initial board of directors and the names and addresses of the persons who are to serve as directors;
7) the name and address of each incorporator;
8) provisions regarding the issuance and classes of stock by the corporation;
9) provisions relating to the payment of dividends; and
10) liquidation and dissolution procedures.

If a tribal corporation is owned in whole or in part by the tribe itself, the tribe's legislative body must formally approve its articles. If not, the articles are simply filed with the tribal official who is the equivalent to a Secretary of State. Such an official will review and approve the articles of the corporation, and then issue a "certificate of incorporation" or charter to the incorporators. Unless otherwise specified, corporate existence begins when the certificate of incorporation is issued by the government.

In the case of a wholly-owned tribally-chartered corporation, the corporation's articles will generally spell out the role of the tribe (as represented by the tribe's legislative body) in:

- Electing and removing the initial and successor directors
- Approving the initial articles of incorporation, and any amendments thereto
- Approving the entity's capital and operating budgets
- Negotiating any dissolution, liquidation or merger of the entity.

Other issues to be resolved in the corporation's organizational documents include the payment of earnings or corporate dividends to the tribe, and issues relating to sovereign immunity.

Management—Tribal law corporations are managed and overseen by a corporate Board of Directors who are elected by the corporation's shareholders. If the tribe is the corporation's sole shareholder (whether or not the corporation formally issues shares), the tribe's legislative body generally exercises the power to elect directors (and may remove them under certain circumstances). Directors approve budgets, approve the hiring of and set compensation for senior executive officers, establish the overall business strategy of the corporation, and hold its officers accountable for executing such strategy. A CEO or executive director is usually in charge of day-to-day operations.

3. Relationship to Tribal Government

When a tribe forms a wholly-owned corporation, it generally expects to retain overall control of the corporation while, at the same time, segregate the corporation's business affairs and assets from the operations of its government. Thus, while the tribe may be the sole shareholder of the corporation, the corporation will likely be managed by its own board of directors. The board of a tribal corporation will generally have some degree of autonomy from the tribe's elected leadership.
The extent to which a tribal law corporation has autonomy from the tribal government may determine in large measure whether it can claim to share the same immunity from suit as the government itself.

4. **Sovereign Immunity and Liability Issues**

One of the key characteristics of any corporation is limited liability. In the corporate context, limited liability means that the shareholders of a corporation are generally not personally liable for the debts of the corporation in which they own stock. When a corporation is wholly owned by a tribe, the tribal corporation's organizing documents or other law should make clear that the tribe is under no obligation to the corporation or its creditors--other than to the extent of its contributed capital or other consideration for the shares that it owns. However, if a corporation that is wholly owned is not treated as a separate legal entity by its owner or if corporate formalities are ignored, the creditors of the corporation could seek to "pierce the corporate veil" in order to access tribal assets. See Appendix B, *Steps to Protect Corporate Veil and Limit Liability*. Anticipating the possibility of corporate veil piercing, many tribal corporation statutes, ordinances or organizing documents also make clear that by incorporating or operating a corporation, the tribe should not be deemed to have waived its sovereign immunity from suit or any other privileges of sovereignty.

In certain situations, corporations organized under tribal law may share the organizing tribe's sovereign immunity from suit. Courts have developed various methods of analysis for determining whether a particular tribally chartered corporation is immune. These inquiries tend to be highly fact specific which makes advance planning a difficult task. Still, several principles have emerged.

- Whether a judgment against the tribal corporation will reach the tribe's assets
- Whether the tribal corporation has the power to bind the tribe's assets or obligate tribal funds
- Whether the tribe and the tribal corporation are closely linked in governing structure and other characteristics, including
  - tribal control over appointment and removal of board members
  - extent of board's power over the corporation
- Whether federal policies designed to promote tribal self-determination are furthered by extending immunity to the corporation
- Whether the corporation is organized for governmental or commercial purposes
- Whether the corporation holds title to property in its own name
- Whether the entity is legally separate and distinct from the tribe (e.g., as is normally the case with a separately incorporated entity).
As a general rule, the more inter-connected the tribe and the corporation, the more likely a court will be to find that the corporation shares the tribe's immunity from suit. If the entity operates in a manner that is largely independent of the government, it is not likely to be able to cloak itself in governmental immunity. However, if the entity is a mere agent or instrumentality of the tribal government created to carry out a governmental purpose, it should be able to claim governmental immunity from suit. Such immunity may be waived, however, without waiving the tribe's immunity. For further detail, *See Appendix A, Sovereign Immunity Factors in Recent Judicial Decisions.*

5. **Tax Treatment**

While the IRS has consistently ruled that federally recognized tribes and federally-chartered tribal corporations (e.g., corporations organized by tribes under section 17 of the IRA or section 3 of the OIWA) are not subject to federal income tax, it has not charted a clear course with regard to the tax treatment of tribally-chartered corporations. In fact, for the past several years, the Treasury Department and the IRS have listed the federal tax treatment of corporations organized under tribal law as an official "guidance priority," but no guidance has been forthcoming.

The uncertainty over the tax treatment of tribal law corporations dates back to the issuance of Revenue Ruling 94-16 in 1994 and the subsequent issuance of regulations on the classification of business entities two years later in 1996. In Revenue Ruling 94-16, the IRS ruled that federally chartered tribal corporations should be treated the same as the tribe for federal income tax purposes, but that state-chartered corporations should be treated like ordinary corporations--taxable on their income and required to file federal corporate income tax returns. Revenue Ruling 94-16 did not address the tax treatment of corporations chartered under tribal law.

Following the issuance of Revenue Ruling 94-16, the IRS issued new regulations on the classification of business entities for federal tax purposes. These so-called "check-the-box" regulations confirmed the tax-free status of Section 17 and Section 3 corporations. They did so by stating that such "federally chartered" entities, although generally meeting the definition of a "corporation," will not be recognized as "separate entities." Thus, such corporations share the same tax status as the tribe. At the same time, in the 1996 preamble to these regulations, the IRS acknowledged the tax treatment of tribal law corporations was "unclear" and noted that the Treasury Department and IRS were studying the issue.

In 2001, Treasury/IRS formally agreed to resolve the uncertainty regarding tribal law corporations in guidance to be issued by the IRS. Since then, the anticipated "guidance on the income tax status of wholly-owned corporations chartered under tribal law" has been an item listed on the annual Treasury-IRS Priority Guidance Plan. *See 2006-2007 Priority Guidance Plan (August 15, 2006) at http://www.irs.gov/pub/irs-util/2006-2007gp.pdf.* The uncertain tax treatment of tribal law corporations has also been referenced in a recent addition to the Internal Revenue Manual, which reads as follows:
In addition, many tribes form corporations utilizing their own corporate code or resolution process. The tax status of corporations chartered under tribal law and owned 100% by the tribe is not clear. A revenue ruling is anticipated to address this issue. 46

The resolution of this issue is still highly uncertain.

In the view of some commentators, the central issue is whether wholly owned tribal law corporations are exempt on a per se basis or only to the extent that such entities have been structured as "integral parts" of the tribe.47 Prior to 2005, the IRS had issued private letter rulings treating certain tribally chartered entities the same as the tribe for tax purposes after determining that such entities functioned as an "integral part" of an Indian tribe.

Over the past several years, case law and IRS rulings have cited the following factors as relevant to the "integral part" determinations:

- Whether the government has the authority to terminate the existence of the entity
- Whether the government or a governmental body elects members to the entity's board
- Whether the government has the power to recall or remove the members of the entity's board
- Whether the government has made a significant financial commitment (or transferred significant property) to the entity
- Whether the government has a substantial right to the profits earned by the entity
- Whether the government is liable for acts of the entity
- Whether the entity is essentially an operating unit or agency of the government.48

In recent guidance issued in the form of private letter rulings, the IRS has highlighted two of these factors as being essential to establishing "integral part" status:

1) governance control; and
2) financial commitment.49

Thus, if a tribal law corporation is utilized for economic development purposes, the case for favorable tax treatment is strongest if the entity is structured to meet the "integral part" test. While the determination as to whether an enterprise qualifies as an integral part of the tribal government depends on all the facts and circumstances, it is
critically important to establish (1) the tribe's degree of governance control over the enterprise, and (2) the tribe's financial commitment to the enterprise.

It is difficult to predict whether the IRS revenue ruling that is expected to be issued in the next few months will continue to reflect this approach or chart a new course altogether.

The status of tribally chartered corporations under state tax law varies from state to state. Their status also may vary according to the type of tax involved.

In California, the only type of corporation that qualifies to be treated the same as the tribe for sales and use tax purposes is one that is "organized under tribal authority" and wholly owned by Indians or by the tribe itself; other types of corporations, even though they may be wholly owned by the tribe, apparently do not qualify for the special sales and use tax exemptions afforded to Indians, tribes and tribal organizations.50

In Oklahoma, the Oklahoma Tax Commission has taken the position that the sales tax exemption of Indian tribes does not extend to any "corporations, partnerships, or other business or legal entities," but "only applies to transactions with a federally recognized Indian tribe itself."51

6. Financing Considerations

Since it is not clear whether a tribally chartered corporation will be treated as an "integral part" of the tribe for federal income tax purposes, it is also unclear whether such an entity can issue tax exempt bonds. Under the terms of the applicable statutory provisions, only tribal governments and their political subdivisions can issue tax-exempt debt.52 Further, depending on the activities of a tribally-chartered corporation, its use of tax-exempt bonds might be prohibited if they are issued to fund facilities or operations not deemed to serve an essential governmental function.

Where the facilities or operations to be financed do not meet the essential governmental function test under section 7871 for tax-exempt bond financing, a tribal law corporation may seek or arrange other types of financing, such as:

- Government-guaranteed loans
- Taxable bond issuances
- Private placements
- Commercial bank financing.

Recently enacted tax-credit bonds, such as those provided for "clean renewable energy facilities" ("CREBs") under the Energy Policy Act of 2005, are limited to Indian tribal governments and their political subdivisions.
The Small Business Administration ("SBA"), by contrast, generally favors the use of corporations and other business entities, rather than the conduct of business by tribal governments and their political subdivisions. To qualify for contracting preferences under Section 8(a), the tribe must organize a separate and distinct legal entity, that is "for-profit" and is capable of being sued. It may be organized under either state or tribal law. Thus, under SBA 8(a) rules, a tribal law corporation would be a viable choice if SBA preferences are being sought. If an SBA loan is sought, government-owned corporations generally do not qualify, but there is an exception for tribal government-owned entities.53

Under the Department of the Interior's Loan Guaranty, Insurance, and Interest Subsidy Program (administered by the Office of Indian Energy and Economic Development ("IEED")), any business entity that is at least 51 percent owned by a federally recognized tribe may qualify for a government-guaranteed loan.

The IEED program and other financing options are discussed in detail in Chapter II.A.5.

7. Advantages and Disadvantages

Advantages of conducting economic development and business activities through a tribally chartered corporation include the following:

- Ease of formation
- Confirmation of tribal sovereignty and freedom from state corporate regulation
- Flexibility (ability to design own governance structure and rules)
- Possible tax immunity
- Possible immunity from suit.

Disadvantages of conducting such activities through a tribally-chartered corporation include the following:

- Uncertainty of federal tax treatment
- Certain business partners may not be comfortable lending to or investing in an entity that is not incorporated under the law of one of the 50 states
- Uncertainty whether the entity would qualify as an issuer in a tax-exempt financing
- Uncertainty whether the tribal corporation will be recognized as sharing the tribe's sovereign immunity.

In sum, a tribally chartered corporation is a flexible entity form that works well in many situations—e.g., where it is intended to operate principally on-reservation as an arm of the tribal government. It would not be the entity of choice for extensive off-reservation activities or as a joint venture entity involving non-tribal parties. The
continuing uncertainty surrounding its treatment for federal income tax purposes has diminished its attractiveness for many tribes.

**Case Study—Ho-Chunk, Inc.**

Ho-Chunk, Inc. is chartered under the laws of the Winnebago Tribe and is wholly-owned by the Tribe. The Winnebago Tribe is organized under Section 16 of the Indian Reorganization Act (IRA). Ho-Chunk, Inc. was formed in 1994 to diversify the Tribe’s business interests while maintaining a separation between business activities and the tribal government. Pursuant to its Section 16 IRA constitution, the Winnebago Tribe adopted a Winnebago Business Code that permits the formation of wholly-owned tribal corporations. Incorporating under tribal law gives the tribe more control over determining the powers and authority of the corporation and which privileges and immunities of the tribe to confer on a tribal corporate entity. The Winnebago Business Code gives the Tribe the option of conferring all the privileges and immunities of the Tribe on tribally-owned corporations.

The Tribe formed Ho-Chunk, Inc. as a general purpose holding company that promotes economic self-sufficiency and creates jobs through its enterprises, joint ventures and investments. Operating subsidiaries can be formed under the tribal business code. The company has a five-member Board of Directors who is responsible for providing an annual report, audited financial statements and an annual development plan to the Tribal Council. Two of the board members are required to be tribal council members. The two tribal council members ensure that tribal governmental interests are maintained and they keep an informal channel of communication open with the Tribal Council. The Tribal Council appoints board members, formulates the long-term development plan for the corporation, and approves the annual operating plans. The Board of Directors selects the Chief Executive Officer who oversees day-to-day management and strategic decisions for the company. This structure preserves the autonomy of the corporation and permits the corporation and its Board to make business decisions and minimizes political interference by the Tribal Council. This permits the Tribal Council to focus on governance issues and enables business experts to focus on maximizing the profitability of the corporation. Ho-Chunk, Inc. operates 15 subsidiaries in six major business areas, both on and off the reservation.

Source: Ho-Chunk, Inc. and Harvard Project on American Indian Economic Development: Innovations Award.
B. Section 17 Corporation—Federal Law Corporation

1. Description and Examples

In passing the Indian Reorganization Act of 1934 (IRA), Congress intended to provide tribes with the ability to compete in the private business world. Section 17 of the IRA gives tribes the power to incorporate and enables them to waive sovereign immunity to facilitate business transactions, thereby fostering tribal economic development and independence.\textsuperscript{54} Congress realized that the perception, if not the reality, of tribal sovereign immunity could impede a tribe’s economic growth and participation in the business world. Therefore, to address this issue, Congress authorized tribes to organize two separate entities: (1) a political governing body to exercise powers of self-government pursuant to Section 16 of the IRA, and (2) a federally-chartered tribal corporation to engage in business transactions pursuant to Section 17.

Pursuant to the IRA, a Section 16 governmental unit and a Section 17 tribal corporation are distinct legal entities. By forming two legal entities (one with sovereign immunity, the other with the possibility of waiver of sovereign immunity), tribes could maximize the use of their property and assets. Under the two-part scheme, the property of the corporation may be placed at risk, but only to the extent necessary to satisfy the needs of lenders and developers; however, tribal assets held by the tribal political body organized pursuant to Section 16 of the IRA would remain fully protected by sovereign immunity.\textsuperscript{55}

2. Organizational Characteristics

Formation—Establishment of a Section 17 corporation is governed by a Section 17 of the IRA and by its implementing regulations.\textsuperscript{56} However, neither the statute nor its regulations contain detailed procedures for forming a Section 17 corporation. Therefore, there is significant flexibility in how the procedural requirements are met and there is wide variation in the contents of tribal Section 17 corporate charters. Additionally, staff at the BIA Central, regional and local offices may have differing interpretations of the formation requirements particularly with respect to whether a tribe is required to submit a petition for a charter. Recently, the BIA Central Office has delegated more approval power to the Regional offices.

Traditionally, Indian tribes were required to take the following five steps in order to secure final approval of a federally-chartered Section 17 corporation.

Step 1—Tribal Resolution or Petition. The regulations provide that a tribe may initiate the Section 17 corporation formation process by submitting a petition to the Secretary of the Department of the Interior to issue a corporate charter. Prior to the 1990 amendments to Section 17, some agency personnel and attorneys interpreted the petitioning requirement to apply only to tribes with constitutions. Pursuant to recent BIA practice, the formation process may be initiated by tribes with or without constitutions—
simply by passing a tribal resolution for the issuance of a charter--without submitting a formal petition.

**Step 2--Draft Charter.** The next step is to draft the corporate charter, which is a document similar in form and scope to Articles of Incorporation, but generally with more detail. The charter describes the organizational framework for the entity that the tribe is seeking BIA approval. The corporation must be structured as a legal entity that is wholly owned by the tribe, but separate and distinct from the tribal government.

**Step 3--Approval by the Tribe.** Once drafted, the charter must be submitted to the tribe for approval. According to the BIA, the procedure for obtaining tribal approval is set by the law of the tribe, and not by federal law. If the tribe's constitution (or other organic documents) allows the Tribal Council to form corporations, a Council resolution is generally sufficient; if not, a vote of the general membership must be scheduled.

**Step 4--Filing of Petition/Resolution.** After the tribe signs the resolution or petition and approves the charter, both documents should be submitted to the local BIA office having administrative jurisdiction over the Tribe. Once received by the local BIA office, the documents will be reviewed to ensure that the submission is complete. If complete, the charter documents will be forwarded to the regional BIA office for further review and approval. (Under a recent delegation of authority, only if the regional BIA office proposes to disapprove the documents will they be forwarded to the Central or national BIA office for further review.) Upon a determination that the resolutions and proposed charter are consistent with tribal and federal law, and properly approved by the tribe, the Regional BIA office will issue an approved charter of incorporation.

**Step 5--Ratification of Corporate Charter.** Once the charter is approved, it will be returned to the Tribe for ratification. The Section 17 statutory provisions require that the corporate charter be ratified by the governing body of the tribe before it becomes effective. Once the charter is ratified by the Tribe, the statutory requirements are met and the charter becomes operable.

When Section 17 was first enacted, tribes were required to first organize a governing body under Section 16 in order to be eligible to organize a corporate entity under Section 17. The IRA was amended in 1990, and now tribes can form a Section 17 corporation regardless of whether they have formed their governing body pursuant to Section 16 of the IRA or pursuant to tribal law. Originally, the IRA did not apply to Alaska Natives or to Oklahoma tribes; it has subsequently been amended to extend to Alaska Natives and a similar provision was enacted for Oklahoma tribes. The Oklahoma Indian Welfare Act (OIWA) authorizes the formation of tribal corporations in a manner similar to the IRA and extends to tribes organized under the OIWA any other rights or privileges secured to an organized Indian tribe under the IRA. The 1990 amendments also extended the ability to form Section 17 corporations to tribes that voted to reject the IRA.
Neither the Section 17 statutory provisions nor the regulations provide guidance on how to amend a Section 17 corporate charter once it has been issued. For this reason, tribes frequently draft the corporate purposes section of the charter as broadly as possible to accommodate prospective changes in the Section 17 corporation's business activities and operation. In drafting the corporate charter, some tribes have vested tribal governing body (e.g., the Tribal Council) with authority to seek BIA approval of amendments as well as the authority to ratify such amendments. Once issued, a Section 17 corporate charter can not be revoked or surrendered, except by an Act of Congress. 59

Management--Section 17 corporations are managed and controlled by a Corporate Board of Directors appointed by the tribal government. The Board of Directors manages and operates the Corporation in accordance with its federal corporate charter. A CEO or a manager is usually in charge of its day-to-day operations.

General Characteristics--Section 17 corporations are tribal in character, they must be wholly-owned by the tribe and are essentially alter egos of the tribal government. They share the same privileges and immunities as the tribal government. The corporate charters may convey the following powers to the incorporated entity:

- Power to buy and sell real and personal property; including the power to purchase restricted Indian lands
- To enter into leases or mortgages of tribal land for a term of 25 years without Section 81 approval by the Secretary of the Interior 60
- To enter into contracts or agreements without Section 81 approval by the Secretary of the Interior 61
- Further powers "as may be necessary to the conduct of corporate business."

A federal corporate charter often permits the corporation to establish and manage subsidiary corporations. Tribes have operated construction, manufacturing, gaming, and government contracting companies through Section 17 corporations. Section 17 incorporation provides a separation of the business entity from the tribal government body. A Section 17 corporation holds assets or property separately from the tribal governing body. Land and assets used by corporation are specifically conveyed or set aside for the corporation. A Section 17 corporation will typically have separate bank accounts, separate directors, and separate assets. Although the enterprise is wholly-owned by the tribe, the tribal council is typically not involved in day-to-day management decisions either directly or indirectly.
The Board of Directors of the Corporation has control over the direction and business activities of the Corporation.

The Tribal Council is not involved in the day-to-day activities of the Corporation, but rather sets strategic economic policies for the tribe.

3. **Sovereign Immunity and Liability Issues**

**Sovereign Immunity**—The Indian Reorganization Act (IRA) was intended to allow tribes to enter and compete in the business world. Understanding that sovereign immunity could be an impediment to enabling tribal governments to successfully compete in the business world by hampering the ability of tribes to obtain credit or attract investors, Congress authorized tribes to form a separate legal entity to engage in business activities: Under the IRA, a tribe may form a constitutional governing body pursuant to Section 16 and a tribal corporation to engage in business transactions pursuant to Section 17. Typically, a Section 17 corporate charter will vest the corporation with the same privileges and immunities of the tribe, including the tribe’s immunity from suit. The charter will describe the authorized purpose of the corporation and whether the corporation is permitted to borrow money, encumber corporate assets, and whether it can waive sovereign immunity for certain transactions. The corporate charter usually describes the corporation’s power to act, who can act on the corporation’s behalf, the
ability of the corporation to waive sovereign immunity, to what extent corporate assets can be encumbered and what corporate actions can be undertaken without the approval of the tribe.

Section 17 corporate charters often contain a "sue and be sued clause." This clause usually permits the corporation to be sued in its corporate name. Some courts have held that this language constitutes a waiver of sovereign immunity of the corporation. However, other courts have indicated that the inclusion of a "sue and be sued clause" does not constitute a waiver unless it is both unrestricted in scope and explicit in its intent to waive immunity. The execution of a judgment against the corporation is limited to the business activities of the corporation and to "assets specifically pledged or assigned" to the corporation.

The BIA has drafted a model corporate Section 17 charter which provides that the "sue and be sued clause" of the charter is subject to limitations contained in the charter which restrict the scope of the waiver that can be granted pursuant to the "sue and be sued clause." Waivers of sovereign immunity pursuant to the "sue and be sue clause" in the corporate charter should be limited to a waiver of only the corporation’s sovereign immunity and transactions of the corporation. These limitations include restricting the waiver to specific transactions or claims or classes of claims for which the waiver is granted, and that the waiver extends only to the property and income of the corporation and not to the tribe itself.

Even where there is a limited waiver, the IRA protects the assets of the tribal government from execution to satisfy a money judgment. Control over tribal assets is retained by the tribal governing body except where the tribal government specifically transfers assets or property to the Section 17 corporation. A Section 17 Corporation has authority to convey or lease tribal lands that are assigned to the corporation for a period of 25 years. This permits the tribal government to pledge or assign specific assets to the corporation. This limitation allows a Section 17 corporation to enter into business transactions and to pledge a security interest in corporate assets. The property of the corporation is at risk in the amount necessary to satisfy creditors and developers. However, property owned by the tribal governmental body is still protected by sovereign immunity and is safe from the execution of a judgment against the corporation.

There are several court decisions concerning waiver of tribal sovereign immunity of a Section 17 corporation. Many of these decisions arise from the confusion created when a tribe has not clearly separated the business activities of its Section 16 governing body from the business activities of its Section 17 corporation. In these instances, the court is usually trying to determine in which capacity a tribe is acting. The court will look at who controls the decisions of the business, if the corporation has a separate bank account and its own liabilities, and if assets or property have been assigned to the corporation. If a court determines that tribe is acting in its governmental capacity, then the activities will likely be found to be beyond the scope of the Section 17 "sue and sued" waiver.
4. **Tax Treatment**

The Internal Revenue Service has concluded that federally recognized tribes are not subject to federal income taxes.\(^6^6\) As noted earlier, the IRS has ruled that the income earned by a state, a political subdivision of a state, or an integral part of a state or political subdivision "is generally not taxable in the absence of specific statutory authorization for taxing such income."\(^6^7\) The IRS has taken this same approach to the taxation of income earned by Indian tribes, their unincorporated businesses and their federally chartered corporations because they share the same tax status as the tribe and as such are not taxable entities.\(^6^8\)

In Revenue Ruling 81-295 and Revenue Ruling 94-16, the IRS ruled that any income earned by a federal corporation organized under Section 17 of the Indian Reorganization Act shares the same tax status as the tribe and is therefore not subject to federal income tax regardless of the location of the activities that generated the income.\(^6^9\) Similarly, in Revenue Ruling 94-65, the IRS has ruled that a tribal corporation organized under Section 3 of the Oklahoma Welfare Act is not subject to federal income tax on income earned in the conduct of commercial business on or off the tribe’s reservation.\(^7^0\)

5. **Financing Considerations**

One of the major advantages of establishing a Section 17 corporation for business activities is that such an entity can arrange for financing without subjecting the tribal governmental assets to the risks and liability associated with borrowing money and can limit financial disclosure of records to those of the corporation and not the tribe. Additionally, in a 1998 Private Letter Ruling, the IRS has held that a Section 17 corporation can be both the borrower and the issuer in a tax-exempt financing if other requirements for tax exempt financing are met.\(^7^1\) When the Section 17 corporation, and not the tribal government, is the issuer/borrower, overly invasive disclosure of tribal financial records may be avoided.

Where the facilities or operations to be financed do not meet the essential governmental function test under section 7871 for tax-exempt bond financing, the Section 17 corporation may seek or arrange other types of financing--such as:

- Government-guaranteed loans
- Tax-credit financing
- Taxable bond issuances
- Private placements
- Commercial bank financing.

*These options are discussed in detail in Section II.A.5.*

6. **Advantages and Disadvantages**
Advantages and Disadvantages--A Section 17 corporation can provide an attractive business structure for tribes because it establishes a legal entity to conduct and manage business activities separate from the tribe itself. It also segregates tribal governmental assets and liabilities from those of tribal businesses, minimizing the financial risks of the tribe. The assets and property of the business are conveyed to a separate legal entity and can be separately pledged as collateral. Thereby by limiting the liability of Section 17 corporation. It permits a tribe to tailor a waiver of sovereign immunity to fit the specific business activities that will be conducted by the corporation. It also safeguards the decision-making authority of the tribal government governments and assigns the responsibility for operating and managing business activities with the Board of Directors of the corporation and a business manager.

The advantages of operating a business as a Section 17 corporation include:

- Entity will have the same privileges and immunity as the tribal government including tribal sovereign immunity
- Segregates the assets and liability of the corporation from tribal assets
- Not subject to federal income tax
- Has 25 year leasing authority for tribal reservation lands and Section 81 approval by the Secretary of the Interior is not required
- Contracts and agreements of the corporation are not subject to Section 81 approval by the Secretary of the Interior.

Disadvantages include:

- The time to obtain a corporate charter issued by the Department of the Interior can be lengthy because of the various steps involved
- Once issued, the charter can only be revoked by an act of Congress
- A Section 17 corporation must be wholly-owned by the tribe--precluding equity ownership in the enterprise by outside investors.
Case Study—S&K Technologies, Inc.

In 2006, the Confederated Salish and Kootenai Tribes formed S&K Technologies as a Section 17 Corporation. The tribal council passed a resolution approving the draft Charter and then submitted the draft Charter and petition to the Secretary of Interior to issue a charter. The corporate charter was then ratified by the tribe.

The Section 17 charter confers all the privileges and immunities of the tribe to S&K Technologies and permits the tribe to confer all privileges and immunity to tribally-owned subsidiaries chartered under the holding company. The S&K Technologies is a general purpose company and its corporate charter permits the corporation to charter subsidiaries under either the tribe’s Tribal Corporation Code or under its newly adopted tribal Limited Liability Company Code. S&K Technologies is headquartered on the Flathead Indian Reservation in Montana. S&K Technologies plans to charter subsidiaries under the tribal LLC Code to operate its aerospace and information technology companies that are participating in the Small Business Administration 8(a) business development program. These tribal 8(a) LLCs will operate in Alaska, Georgia, Ohio, and the Pacific Northwest. The corporate charter is broadly drafted so that the corporation could also create other non-8(a) business entities.

S&K Technologies will be governed by a seven-member Board of Directors appointed by the Tribal Council to four year staggered terms and who are responsible for providing an annual report to the Tribal Council. The corporate charter does not restrict board appointments to tribal members or require that tribal council members be appointed to the board. The S&K Technologies Board of Directors will be responsible for hiring a CEO for each of the subsidiaries created under the holding company who will be responsible for day-to-day operations of the company. There will not be separate boards of directors for each of the subsidiaries; rather each CEO will report to the Board of Directors of S&K Technologies Corporation. This safeguards the decision-making authority of the Tribal Council and assigns the responsibility for operating and managing the business activities of the Section 17 Corporation to the business managers they hire. It permits business experts to focus on maximizing the profitability of S&K Technologies.

Source: S&K Technologies, Inc.
IV.

STATE LAW ENTITIES

Business entities organized under state law include corporations, partnerships and limited liability companies. This chapter focuses on state law corporations and state law limited liability companies (LLCs) that have a single member, reserving discussion of partnerships and multiple-member LLCs to the Handbook chapter on Joint Ventures. This chapter also discusses a special election available to entities that qualify as corporations under federal tax law called the "S election." It should be noted at the outset that a governmental entity, such as an Indian tribe, is not a qualified "S corporation" shareholder.

A. State Law Corporations

State-law corporations are relatively easy to organize and offer certain advantages. Virtually every state has a statute that permits persons to organize a corporation for business or nonprofit purposes. Distinguishing characteristics of the corporate form of doing business include limited liability for the owners of the corporation, centralized management, transferability of ownership interests (generally in the form of shares of stock), and continuity of life. Since 1994, the IRS has taken the position that a State law corporation, even if wholly owned by a federally recognized tribe, does not share the same federal tax status as the tribe. Because of this unfavorable treatment, many tribes avoid forming state-law corporations--even though they are easily organized and widely recognized by potential business partners and lenders. A state law corporation is also more likely to be viewed as separate from the tribe, and thus not as an entity that shares in the tribe's sovereign immunity from suit.

1. Brief Description

   a) Powers of business corporation defined by charter and state law

The powers of a business corporation are generally defined by its charter (or articles of incorporation) as limited by state law. Typical powers for state law corporations include the powers to do the following:

- Sue and be sued, complain and defend in the corporation's own name
- Purchase, receive, lease, own, hold, improve and otherwise deal in or with real or personal property
- Sell, convey, mortgage, pledge, exchange or otherwise dispose of property
- Lend money
- Acquire interest in another enterprise or entity
• Enter into contract and guarantees
• Incur liabilities, including through the borrowing of money or issuing of bonds
• Transact any lawful business.

b) Separate legal entity

The essence of a corporation is that it is a legal entity from its owners. Courts are generally reticent to "pierce the corporate veil" (i.e., to disregard the legal separateness of a corporation vis-à-vis its owners) unless certain factors are present. Some of the key steps that can be taken to avoid veil piercing include:

• Adequate capitalization
• Compliance with legal requirements for issuance of stock
• Maintenance of corporate records
• Maintenance of separate financial records and bank accounts
• Avoidance of inter-corporate loans
• No guarantees by tribe of subsidiary's debt
• No assignment of contracts between tribe and subsidiary
• No representation the entity's primary purpose is to limit liabilities
• Maintenance of adequate insurance
• No interlocking or identical boards.

These same key steps should also be taken to protect the separate status of other limited liability entities, whether such entities are formed under state law or tribal law. See Appendix B, Key Steps to Protect the Corporate Veil and Limit Liability.

c) Power to sue and be sued

In virtually all states, corporations have the power to sue and be sued. How this power is interpreted varies from state to state. State law (including judicial interpretations of this power) should be reviewed to determine whether or not it is consistent with corporation's claim to tribal sovereign immunity where the corporation is wholly owned by the tribe.

2. Organizational Requirements

The organizational characteristics and requirements for a state law corporation will vary according to the applicable law of the state under which it is formed. Most states have very detailed corporate codes--in most cases, with separate provisions for stock and nonstock (i.e., not-for-profit) corporations. There are some common characteristics and procedures for forming and managing corporations.
To form a corporation, the incorporators must generally select a name and draft articles of incorporation. Most states' corporate codes require the following items to be included in the articles of incorporation of any type of corporation:

- The name of the corporation
- The term or period of existence of the corporation (which may be perpetual)
- The purpose(s) for which the corporation is organized (with an eye to consistency with lawful corporate purposes under the state's corporation code or statute);
- Procedures relevant to the governance of the corporation, including the election of directors and rights of shareholders;
- The address of the corporation's initial registered office and the name of its initial registered agent at such address;
- The number of persons constituting the initial board of directors and the names and addresses of the persons who are to serve as directors;
- The name and address of each incorporator;
- Provisions regarding the issuance and classes of stock by the corporation;
- Provisions relating to the payment of dividends; and
- Liquidation and dissolution procedures.

After filing articles of corporation with the state, a newly formed corporation will generally have an organizational meeting to elect its officers and directors, adopt its bylaws, set up its bank account, adopt a fiscal year, and establish a corporate records book to hold its key documents, including the minutes of every board meeting.

3. Relationship to Tribal Government

A state law corporation may be wholly owned and controlled by a tribal government, or it may be owned in part by the tribe and in part by other entities or individuals. A state law corporation will be regulated by the state for corporate law purposes (e.g., compliance with the state's corporate code, fiduciary duty rules, shareholder rights issues).

By incorporating under state law, a tribe does not subject the corporation to state regulation for all purposes—particularly with respect to its on-reservation operations. However, a state law corporation going beyond reservation boundaries will be more likely to find itself subject to state regulation than an unincorporated division of the tribe.

4. Sovereign Immunity and Other Liability Issues
State law corporations are unlikely to be able to assert the organizing tribe's sovereign immunity. While state chartered corporations do not appear to be absolutely precluded from sharing in the tribe's sovereign immunity under appropriate circumstances, it is likely that the corporation asserting immunity would need to be primarily, if not exclusively, involved in on-reservation governmental projects. In such situations, under the law of certain jurisdictions, a tribally-owned state chartered corporation might be viewed as an arm of or alter ego of a tribe. But, it appears that as more courts face the issue, organization under state law may be fatal to a finding of entity-level sovereign immunity, particularly for corporations that are structured to limit shareholder liability.\footnote{72}

The factors relevant to a sovereign immunity analysis of a state law corporation are similar, if not identical to those pertaining to such an analysis of tribal corporation. These factors include:

- Whether the tribe as owner or sole shareholder of the corporation is financially liable for the corporation's legal obligations;
- Whether the corporation's purpose is governmental or commercial;
- The extent and nature of the tribe's control over the corporation; and
- Whether federal policies would be furthered by finding that the corporation shares the tribe's immunity.

*See Appendix A, Sovereign Immunity Factors in Recent Judicial Decisions.*

One court has found that a tribal corporation organized under the District of Columbia Nonprofit Corporation Act could exercise the tribe's sovereign immunity based on the court's analysis of the above factors and their application to the unique facts of the case.

- The corporation's purpose was governmental in nature--i.e., to provide housing and health and welfare services to tribal members.
- The corporation's governing body was comprised mainly of tribal officials, and thus the tribe controlled the entity.
- The tribe's funds were vulnerable to suits against the corporation.

Given the close connection between the entity and the tribe, the court found sovereign immunity was appropriate, even though the entity was incorporated by the tribe under state law.\footnote{73}

Some courts distinguish between entities organized by the tribe in the first instance and those purchased by the tribe subsequent to their incorporation. A Wisconsin court held that a tribe's purchase of a corporation's stock does not normally confer tribal immunity on the corporation.\footnote{74} In that case, even one hundred percent tribal ownership did not serve to extend the tribe's immunity to the acquired state-chartered corporation.
In sum, incorporation under state law lessens the chances that a court will treat the tribally-owned business entity as a sovereign "arm of the tribe." While the multi-factor test approach of current law does not preclude treating a state-chartered corporation like a tribal instrumentality with respect to sovereign immunity, the trend cuts against extending immunity to state-incorporated entities. In most cases, organization under tribal law provides a more flexible framework if the tribe wishes to extend its sovereign immunity to a wholly-owned corporation.

5. Tax Considerations

Since 1994, the IRS has taken the position that a state-chartered corporation, even one that is wholly owned by an Indian tribal government and engaged in exclusively on-reservation activities, does not share the same tax status of the tribe. Revenue Ruling 94-16 represents a significant reversal of a position that the IRS had taken in a series of private letter rulings in the late 1980s. Those rulings held that state law corporations wholly owned by an Indian tribe were not subject to tax if their business activities were conducted on the tribe's reservation. However, Revenue Ruling 94-16 determined that "a corporation organized by an Indian tribe under state law is not the same as an Indian tribal corporation organized under Section 17 of the IRS and does not share the same tax status as the Indian tribe for federal income tax purposes." Citing the Supreme Court's decision in *Moline Properties v. Commissioner,* Revenue Ruling 94-16 states that "generally, the choice of corporate form will not be ignored." Thus, unless there is some other basis for the corporation's exemption from federal income tax (such as an IRS determination that it qualifies as a Section 501(c)(3) organization), a state-law corporation is subject to tax and required to file annual corporate income tax returns (IRS Form 1120).

One unresolved issue is whether a tribally owned state-law corporation is subject to tax on all of its income or only on income derived from its business activities. Corporations are generally taxable not only on their business income, but also on income from investments and other sources. Revenue Ruling 94-16 states that a state-chartered corporation owned by an Indian tribe "is a taxable entity and is subject to federal income tax on all income earned from its business activities." It does not address the tax treatment of such a corporation's investment or other income.

When Revenue Ruling 94-16 was promulgated in early 1994, the IRS provided a period of several months before its new position on the taxability of state law corporations went into effect. This was intended to allow tribes to convert existing state law corporations into some other type of business entity that was not subject to corporate income tax.

As a general rule, a state law corporation that the tribe has formed or acquired cannot be "converted" to another form of entity without significant tax consequences. Section 337(d) and related IRS regulations provide for the imposition of tax on the "built-in gain" of a taxable corporation that converts to a tax-exempt corporation. *See generally Treas. Reg. § 1.337(d)-4.*
When tribes are in the process of acquiring an existing business in corporate form, they often find that shareholders would prefer to sell them the stock of their corporation, rather than dissolve the business and sell the assets to the tribe. Tribes need to be aware in such situations that they may be assuming various types of liabilities, including federal tax liabilities. Because of the "liquidation tax" on the built-in gain of a corporation, tribes should avoid buying the stock of a corporation to ease the sellers' tax burden unless they are prepared to undertake a process of due diligence to accurately quantify any past or prospective tax liabilities thereby assumed.

6. Financing Considerations

A state-chartered corporation wholly owned by an Indian tribe will not qualify as an issuer of tax-exempt bonds. In a 1998 private letter ruling, the IRS addressed the issue of whether a nonprofit state-law corporation formed by a tribe to provide various health care services could issue tax-exempt bonds to finance additions to its health center, including an emergency medical services building and a nursing home, all of which were located on the Tribe's reservation. Citing Revenue Ruling 94-16, the IRS suggested that where a tribe incorporates an entity is under the laws of a state, such an entity is not an integral part of the tribe. Thus, such an entity would not meet the requirement of Section 7871(c), which permits only an Indian tribal government or a subdivision thereof to issue tax-exempt bonds.  

An additional question in the tax-exempt financing area is whether a tribe's state-chartered corporation could be the recipient of tax-exempt financing as a borrower. If such a corporation is wholly-owned and the facilities to be financed constitute essential governmental functions, it would appear that a tribe could issue bonds on a tax-exempt basis and re-lend the proceeds to a state-chartered corporation, particularly one that is wholly owned by the tribe. However, the issue has not been definitively addressed in any IRS guidance issued to date.

Other forms of financing discussed elsewhere in this Handbook may be available for state-law corporations and LLCs that are wholly-owned by an Indian tribe. Such other options include:

- Government-guaranteed loans
- SBA loans
- Taxable bonds
- Private debt placements
- Commercial bank financing.

B. Subchapter S Corporations

Subchapter S of the Internal Revenue Code treats an "S corporation" as a pass-through entity similar to a partnership. An S corporation must pass through income and
loss items separately to its shareholders and thus, as a general rule, the corporation is not subject to a corporate level tax on those items. Subchapter S is only applicable to a "small business corporation," defined as a domestic corporation that does not have more than 75 shareholders.

S corporations are not viable options for tribal ownership. Section 1361 of the Code restricts S corporation ownership to individuals, estates, certain types of trusts, entities described in Section 401(a) (pension plans) and Section 501(c)(3) (charitable organizations). Governmental entities are not listed as qualified S corporation shareholders. Moreover, a recent IRS revenue ruling specifically addresses the question of tribal government ownership of S Corporations, and concludes that tribal governments are not qualified S Corporation shareholders under current tax law. 78

C. State-Law Limited Liability Companies

An increasingly popular choice of business entity is the limited liability company ("LLC"). An LLC has the advantage of limited liability like a corporation. However, it is generally taxed like a partnership or other "flow-through" entity. If wholly-owned (i.e., an LLC with a single member), the LLC may be disregarded as a separate entity for tax purposes. However, a state-chartered LLC—even one that is wholly-owned by a tribe—would likely be treated as a separate legal entity for purposes of legal liability purposes. Thus, it might be difficult (but not impossible) for such an entity to assert tribal sovereign immunity.

1. General Description of Limited Liability Companies

The LLC is a type of organization that provides its owners with limited liability just like a corporation, but LLCs are not subject to double taxation like corporations are.79 LLCs have become the preferred investment vehicle for investors who want to participate in the management of the entity's business and still limit their personal liability. Under the LLC structure, all of the members obtain the tax advantages of a pass-through entity, but unlike the limited partnership structure, members can limit their personal liability regardless of whether or not they participate in the management of the LLC's business. Thus, a closely held business that is structured as LLC is generally able to benefit from certain corporate advantages without jeopardizing its favorable tax. 80

2. Organizational Requirements

An LLC can be quickly and easily organized under the laws of most states. All that is required is that the organizers select a name and file a document similar to a corporation's Articles of Incorporation. In the case of an LLC, this document is generally referred to as the LLC's Articles of Organization. The key issues required to be addressed in the Articles of Organization are:

- Name of the organization
• Street address of the registered office of the LLC and the name of the registered agent at that office
• Brief description of the type of management structure of the LLC
• Name and address of each person organizing the LLC
• A statement that the LLC is organized under the LLC act or Code.

All other details about how the LLC is organized, managed, and owned can be reserved to the Operating Agreement, which does not need be filed with the State or made public.

Most LLCs supplement their Articles of Organization with a fairly detailed Operating Agreement, that spells out how they will be managed. From a management perspective, LLCs fall into one of two types: (1) member-managed; and (2) manager-managed. A "member-managed" LLC is subject to more control by its legal owners than a "manager-managed" LLC.

3. Liability and Sovereign Immunity

A chief characteristic of any state-law LLC is its ability to limit liability to the assets of the company, thereby protecting the LLC’s owners or members from any personal or individual liability for the company's debts. State LLC statutes typically provide that the debts, obligations, and liabilities of an LLC will be solely those of the LLC, and no member or manager of the LLC will be personally obligated for such liability. At the same time, such statute laws generally permit LLC managers or members to agree to assume personal liability for any debts of the entity.

It is highly unlikely that state or federal courts would recognize a state-law LLC formed to engage in business as sharing in the sovereign immunity of a tribal government—even if the LLC’s sole member is an Indian tribal government. One major hurdle is the fact that state law shields the owner of an LLC from its liabilities, but clearly contemplates that the LLC itself can be sued.

While no reported cases have explicitly held that formation of a state-law LLC eliminates tribal immunity for the LLC, at least two cases have suggested that such is the case. First, a Connecticut state court in an unreported opinion stated that taking ownership of an off-reservation hotel in LLC form removed any immunity with respect to the LLC’s conduct of hotel operations. The Mashantucket Pequot Tribal Nation took ownership of the hotel through a newly-formed LLC of which it was the sole shareholder. Members of the hotel management team sued the LLC on various tort claims. The tribe did not assert sovereign immunity as a defense, and the jury returned a multi-million dollar verdict against the LLC.

Second, a California case contains language implying that a tribe, as sole shareholder of the LLC, might be liable under common law "alter ego" liability. The case involved breach of contract claims against an LLC of which the tribe was originally
a 51% owner (and then later, a 100% owner). The plaintiff alleged that the LLC was an alter ego of the tribe and the court allowed discovery on the alter ego and sovereign immunity issues to proceed. In doing so, the court refused to accept the tribe's sovereign immunity as a basis for precluding litigation of the controversy.

Comment: Tribal law LLC codes are frequently more flexible in this regard. For example, the Ho-Chunk Nation's LLC Code states that "if the Nation is the sole member of a LLC formed under this Act, that LLC shall possess the Nation's sovereign immunity from suit except to the extent otherwise provided in its Articles of Operation."

4. Tax Considerations

The federal tax treatment of LLCs is provided for under sections 301.7701-1 through 301.7701-3 of Treasury Regulations governing the federal tax classification of business entities (sometimes referred to as the "check-the-box" regulations). The check-the-box regulations allow certain entities to choose classification as either a partnership or a corporation, or to be treated as a disregarded entity for federal tax purposes. The check-the-box regulations also provide default classifications for certain business entities. Elections (on IRS Form 8832) are necessary only when an entity chooses initially to be classified as other than the default classification or when an entity chooses to change its classification.

Under the IRS check-the-box regulations, an LLC with a single owner is generally treated as a disregarded entity. As such, it is treated in the same manner as a branch or division of the owner. An LLC with two or more owners is generally treated like a partnership for tax purposes.

IRS regulations set forth a number of entities that are per se classified as corporations for federal income tax purposes. This list includes entities referred to as "incorporated" or as a "corporation," "body corporate," or "body politic" under a federal, state or tribal law or statute. This list of per se corporations does not include domestic limited liability companies (LLCs)--other than LLCs wholly owned by a state or foreign government. See Treas. Reg. §301.7701-2(b)(6).

The check-the-box regulations treat LLCs that are wholly owned by a state or foreign government as per se corporations. At the same time, they fail to specify how a tribal government-owned LLC will be treated.

Comment: In the absence of a rule deeming tribal LLCs to be corporations, most advisers believe that tribal government-owned LLCs should be treated as a division of the tribal government for tax purposes. The IRS has specifically ruled that an LLC with a tax-exempt organization as its single member should be disregarded as a separate legal entity and treated as a division of the single member.
D. **Advantages and Disadvantages of State-Law Business Entities**

The primary advantages of using a state-law business entity includes the following:

- State-law corporations and LLCs are easily and quickly organized
- State-law entities are familiar to lenders and potential business partners
- State-law entities can be effectively used to acquire or merge with an existing state-law entity.

In addition, state-law LLC are disregarded for federal income tax purposes when owned by a single member, such as a tribe.

Disadvantages include the following:

- State-law corporations are subject to federal income tax
- State-law entities are not qualified issuer in a tax-exempt financing
- State-law entities are not likely to be regarded as government instrumentalities that are immune from unconsented suit.

For off-reservation ventures, state-law LLCs still have a number of advantages and, from a tax perspective, very few disadvantages.
V.

JOINT VENTURE ENTITIES

There are several different types of entities that can be utilized for purposes of establishing a joint venture between an Indian tribe and a business partner other than the tribe:

- A Limited Liability Company ("LLC")
- A General Partnership ("GP") or a Limited Partnership ("LP")
- A Corporation.

In each case, the equity interests in the joint venture entity will most likely be owned in part by the tribe and in part by another party.

Each of these entities has certain advantages and disadvantages. However, in this chapter of the Handbook, we will focus the discussion on the two entity types that are the most advantageous for tribes to utilize--LLCs and LPs.

Although there may be occasions in which the parties to a joint venture prefer or are required to operate in corporate form, the tax consequences to an Indian tribe of operating a joint venture through a corporation are generally not as favorable as operating the joint venture through a non-taxable or flow-through entity. A corporation that is not wholly owned by a tribe is subject to corporate income tax on all of its income. Moreover, the corporation's taxable owners may also be subject to a second level of tax when they receive distributions from the corporation in the form of dividends. The two levels of tax on the income of a corporation can be reduced if the corporation's income is decreased by deductible fees paid to the equity owners for services rendered. Nevertheless, because LLCs and partnerships are generally more favorable to use for joint ventures than corporations, this chapter does not discuss in detail the use of corporations for joint ventures, but instead focuses on the use of LLCs and partnerships. Although there is one type of corporation, an S corporation, which is taxed as a flow-through entity, because tribes are not eligible shareholders of an S corporation, this chapter also does not discuss S corporations.

When a tribe forms an LLC or a partnership to engage in a joint venture with another party, tax considerations are not the only considerations. It is important at the outset to make sure that each party's role in the venture is appropriately spelled out in the organizational documents. Care should be taken that the terms of the transaction fairly compensate each party for what it brings to the table. Another key consideration is the inclusion of terms to accommodate a desire on the part of either party to terminate its participation in the venture.
A. Limited Liability Companies

1. Brief Description and Examples

The LLC is a type of organization that provides its owners with limited personal liability just like a corporation, but it is not subject to double taxation as regular corporations are.\(^8^6\) The LLC has become the preferred investment vehicle for investors who want to participate in the management of the entity's business and still limit their personal liability. Under the LLC structure, all of the members obtain the tax advantages of a pass-through entity, but unlike the partnership structure, members can limit their personal liability regardless of whether or not they participate in the management of the LLC’s business. Thus, a closely held business that is structured as an LLC is generally able to benefit from certain corporate advantages without jeopardizing its treatment as a partnership for federal income tax purposes.\(^8^7\)

As noted above, an LLC is a business entity in which limited personal liability may be achieved for the owners--similar to a corporation--while achieving flow-through taxation that is characteristic of a partnership. In addition, unlike a partnership, an LLC may be formed with a single member or owner, as well as by multiple members. The flexibility of the LLC as a business entity is what has lead to its increasing popularity--particularly in the situation where the business starts out with a single owner, but intends to admit additional owners or partners at a later stage.

Tribes are beginning to use LLCs to partner with non-tribal business entities for a variety of purposes:

- To acquire specialized knowledge in fields such as energy or government contracts
- To create the proper incentives for those playing a critical role in a tribally-owned business
- To be able to efficiently allocate certain tax benefits (e.g., low income housing tax credits).

In addition to using LLCs to partner with non-Indian individuals or businesses, tribes are also using LLCs to partner with other tribes. Four Fires, LLC, a economic development entity organized by the Oneida Tribe of Indians of Wisconsin, San Manuel Band of Mission Indians, the Forest County Potawatomi Community of Wisconsin and Viejas Band of Kumeyaay Indians, is a good example of an inter-tribal LLC. It owns a hotel near the United States Capitol building in Washington, D.C.

2. Organizational Requirements

An LLC can be quickly and easily organized under the laws of most states. All that is required is that the organizers select a name and file a document similar to a corporation's Articles of Incorporation. In the case of an LLC, this document is generally
referred to as the LLC’s Articles of Organization (although Delaware, perhaps the most popular state for forming LLCs, refers to them as a Certificate of Formation). The key issues required to be addressed in the Articles of Organization are:

- Name of the LLC
- Street address of the registered office of the LLC in the state where the LLC is being formed and the name of the registered agent at that office
- Description of the purpose for which the LLC is being formed
- Description of the type of management structure of the LLC (e.g., whether the LLC will be managed by its members or by a manager or managing member)
- Name and address of each person organizing the LLC
- A statement that the LLC is organized under the LLC Act or Code of the state where the LLC is being formed.

All other details about how the LLC is organized, managed, and owned can be reserved to the Operating Agreement, which need not be filed with the State or made public.

Most LLCs supplement their Articles of Organization with a fairly detailed Operating Agreement, that spells out how they will be managed. From a management perspective, LLCs fall into one of two types: (1) member-managed; and (2) manager-managed. A member-managed LLC is subject to more control by its legal owners than a manager-managed LLC.

The key features of an LLC Operating Agreement are provisions addressing the following:

- Identity and Classes of Members
- Members' Duties and Obligations
- Management of the LLC
- Contributed Capital and Capital Accounts
- Allocations and Distributions
- Liability and Indemnification
- Withdrawal of Members
- Arbitration and Dispute Resolution.

B. **General Partnerships and Limited Partnerships**

1. **Brief Description**
There are two types of partnerships—general partnerships ("GPs") and limited partnerships ("LPs"). The differences are discussed below.

a) General Partnerships

In a GP, each partner of the GP assumes general personal liability for the activities of the partnership. A GP is easily organized, but is not frequently utilized unless the joint venture partners are incorporated or have some form of liability protection.

b) Limited Partnerships

An LP is a partnership with one or more limited partners and at least one general partner. The most popular feature of the LP is the limited liability of the limited partners. The limited partners are protected against personal liability for debts of the partnership that exceed their equity or capital contribution to the partnership. However, in order to retain this limited liability, the limited partners may not participate in the management or control of the partnership’s business. Unlike the limited partners of an LP, the general partners of an LP assume general personal liability for the activities of the partnership.

2. Organizational Requirements

The core document for a partnership is a Partnership Agreement. The key features of a Partnership Agreement are substantially the same as with respect to the Operating Agreement of an LLC and are as follows:

- Identity and Classes of Partners
- Partners' Duties and Obligations
- Management of the Partnership
- Contributed Capital and Capital Accounts
- Allocations and Distributions
- Liability and Indemnification
- Withdrawal of Partners
- Arbitration and Dispute Resolution.

An LP, unlike a GP with no limited partners, must file an executed certificate of limited partnership with state in which the entity is organized.

C. Considerations Common to LLCs and LPs

1. Relationship to Tribal Government

In forming an LLC or LP that is designed to serve as a joint venture with a third party, the tribe should consider whether it would like to own the LLC directly or through
an intermediary business entity. Because of the tribe's sovereign immunity and other uncertainties, some potential business partners prefer that the tribe hold its interest through an entity that is legally separate from the tribe. Possible options for the tribe include holding the LLC interest through (1) a single-member LLC, (2) a Section 17 or Section 3 corporation, (3) a tribally chartered corporation, or (4) an economic development authority that qualifies as a political subdivision. Because of the unfavorable tax treatment, holding a joint venture interest through a state-law corporation is not recommended.

2. **Sovereign Immunity and Other Liability Issues**

Many of the sovereign immunity and liability issues surrounding tribally owned LLCs and partnerships remain unresolved. Because of the dearth of decided cases, it is unclear whether the sovereign immunity claims of tribal LLCs or LPs will be analyzed similarly to those asserted by tribal corporations or whether a different method of analysis will be used. It is also unclear whether ownership of less than 100% of the entity will be fatal to assertions of immunity from suit. No court has ever held that a business entity that was less than wholly-owned by a tribe can exercise the tribe's immunity. Given this situation, it is safest to assume that the formation of an entity that includes individuals or entities other than the tribe will likely eliminate the connection required to establish that the entity shares the tribe's sovereign immunity.

The only case to discuss the sovereign immunity implications of a partially owned LLC did not decide whether the LLC shared the tribe's immunity. The opinion appears to assume that the LLC, which was 51% owned by the tribe initially and later 100% owned by the tribe, did not enjoy sovereign immunity. However, the contract between the parties anticipated the possibility that a court could hold that the LLC was a "tribally controlled entity" and therefore that it could exercise immunity. The court did not resolve the issue and it is uncertain whether an argument in favor of sovereign immunity would have succeeded.

It is possible that an LLC partially wholly owned by a tribe would be analyzed under the multi-factor test applied to tribal corporations. The applicable factors include: (1) whether the tribe will be financially liable for the corporation's legal obligations; (2) whether the corporation's purpose is governmental or commercial; (3) the extent and nature of the tribe's control over the corporation; and (4) whether federal policies would be furthered by finding that the corporation shares the tribe's immunity.

The third factor (extent and nature of tribe's control) would appear to preclude a finding of immunity for any entity that is not controlled by a tribe. If a tribe held more than 50 percent of the ownership interests, it would at least have an argument in favor of a finding of sovereign immunity, but less than majority ownership would seem to eliminate the necessary level of tribal control over the entity.

3. **Tax Considerations Applicable to LLCs and LPs**
In general, an entity that is a partnership (or an LLC that is taxed like a partnership) is not subject to federal income tax. Rather, each partner (or member in the case of an LLC) includes in its income such partner's allocable share of income, deductions, gains, losses, and credits generated by the partnership. LLCs and LPs combine the tax advantages of a "flow-through" or "pass-through" entity with limited personal liability. An LP is considered a pass-through entity because the partnership itself does not pay tax, but, partnership income is allocated and taxed to the partners, whether or not they receive a distribution of all or any part of such income. Furthermore, the partners may use the losses or credits generated by the partnership to offset their income from other sources (subject to certain limitations that are beyond the scope of this manual).

With respect to tribal participation in a partnership, the IRS has stated that a tribe that is a partner in a partnership is not subject to federal income tax. The IRS has cautioned, however, that "a tribally owned state chartered corporation that is a partner [in a partnership] will be subject to federal income tax on its distributive share of partnership income."

Sections 301.7701-1 through 301.7701-3 of the Treasury Regulations (the "check-the-box" regulations) govern the federal tax classification of business entities. The check-the-box regulations allow certain joint ventures to choose classification as either a partnership or a corporation. The check-the-box regulations provide default classifications for business entities. Elections (on IRS Form 8832) are necessary only when an entity chooses initially to be classified as other than the default classification or when an entity chooses to change its classification.

The check-the-box regulations provide, in relevant part, that a "business entity" is any entity recognized for federal tax purposes that is not properly classified as a trust. A business entity with two or more members is classified for federal tax purposes as either a corporation or a partnership.

The regulations set forth a number of entities that are per se classified as corporations for federal income tax purposes. This list includes entities referred to as "incorporated" or as a "corporation," "body corporate," or "body politic" under a federal or state statute, or the laws of a federally recognized Indian tribe. This list does not include domestic limited liability companies (other than those wholly owned by a state or foreign government.) Thus, under the check-the-box regulations, an LLC or LP that has two or more members (one of which is a tribe) will be treated like a partnership for tax purposes unless it specifically elects to be treated like a corporation.

The following federal income tax rules apply to both partnerships (such as LPs) and LLCs:

- Generally, the contribution of "property" to a partnership in exchange for a partnership interest is a nontaxable event for the partnership and the contributing partner.
• A partner may also contribute "services" to the partnership in exchange for a partnership interest.
  • Generally, a partner who receives a partnership capital interest in exchange for performance of past, present or future services for the partnership will realize ordinary income.99
  • Where a partner receives a profits interest in the partnership in exchange for services, the exchange generally will not be treated as generating taxable income.100

• Partnership losses, income, gains, or credits flow through to the partners.
• The character of such income, loss or credit to a partner will be the same as if the distribution bypassed the partnership and was made directly to the partner.

• Because partners are taxed on the income of the partnership whether or not they receive a distribution of all or any part of such income, when a partner actually receives a current distribution from a partnership, as a general rule, neither the partner nor the partnership will recognize gain or loss on the transaction unless the distribution exceeds the partner's basis in its partnership interest, in which event, gain is recognized.

Partnerships and LLCs also have the flexibility to shift economic and tax attributes among the owners, subject to the following restrictions:

• The partners' distributive shares of income, gain loss, deduction or credit are generally determined under the partnership agreement.101

• The allocations of partnership income, gains, losses or credits provided in the agreement must either have "substantial economic effect" or be in accordance with the partners' interest in the partnership.

Although an Indian tribe is not subject to federal income tax, not all of the federal tax rules applicable to other organizations exempt from federal income tax under the Internal Revenue Code (the "Code") are applicable to a tribe or to an entity that shares the same tax status as an Indian tribe.

• First, unlike charitable organizations described in Section 501(c)(3) of the Code, an Indian tribe generally is not subject to federal income tax on "unrelated business taxable income" ("UBTI") under Sections 511-514 of the Code.102 Therefore, an Indian tribe does not need to be concerned about issues related to UBTI in the joint venture context.

• Second, unlike charitable organizations described in Section 501(c)(3) of the Code, an Indian tribe is not subject to the requirements that it operate exclusively for charitable purposes and not for private benefit. Thus, an Indian tribe will not jeopardize its tax-exempt status if it does not "control" a joint venture.
However, Congress has recently stiffened rules aimed at preventing tax-exempt entities (including tribes) from shifting inappropriate tax benefits to taxable parties. Thus, consultation with experienced tax counsel is strongly recommended.

*Note that the discussion in this chapter focuses on federal income tax matters only. LLCs, partnerships and other flow-through entities may be subject to tax in certain states that do not recognize the non-taxable nature of flow-through entities.*

4. **Financing Considerations**

It is unlikely that a public-private joint venture would qualify to utilize the proceeds from a tax-exempt bond offering because of the absolute prohibition on the issuance of so-called "private activity" bonds by an Indian tribal government and the Tax Code's strictly interpreted "essential governmental function" test. However, there are many other types of financing available, including the following:

- Government-guaranteed loans (Department of the Interior’s IEED and SBA)
- Taxable bond issuances
- Private placements
- Commercial bank financing.

Under the IEED Loan Guaranty, Insurance, and Interest Subsidy Program, only a joint venture in which a federally recognized tribe holds a majority interest is eligible for such financing.

The Small Business Administration also has loan programs available to assist small business ventures. Such ventures may be co-owned by a tribe and another party provided that they otherwise meet SBA loan requirement. For example, SBA loans are available only to applicants for whom credit is not otherwise available on reasonable terms.

*These financing options are discussed in detail in Chapter II.A.5.*

5. **Advantages and Disadvantages**

Advantages of conducting economic development and business activities through a jointly-owned LLC or LP include the following:

- Ease of formation
- Flexibility (relative ability to design own governance structure)
- Flow-through taxation resulting in tribe's share of joint venture income flowing through free of federal tax to the tribe.
Disadvantages of conducting such activities through a jointly owned LLC or LP include the following:

- Likely loss of sovereign immunity for the joint venture entity
- Inability to qualify for certain types of financing
- Difficulties in unwinding the venture if one party wants to terminate.
VI.

EVALUATING YOUR OPTIONS

A. Comparison of Each Form

As you have learned there are many possible business structures for tribal governments to evaluate when considering how to organize for economic development. As discussed in the previous chapters, your choice of business structure will have long-term consequences and will impact how tribal assets are protected, how tribal sovereignty is preserved, and how potential liability and tax liability can be minimized. When you evaluate possible structures, you need to take into account various factors about the business activity you are considering—the relative importance of each factor depends on the nature and the extent to which the tribe seeks to keep business decisions separate from tribal governmental decisions, and the degree of financial and legal liability to which it is willing to expose itself and tribal assets. You should devote the necessary time and energy to evaluate the best structure for the particular business you are considering. Below is a brief summary comparing the key factors that should be considered in choosing the best structure for your business.

1. Organizational Requirements

You can choose to organize under federal, state, or tribal law. Your choice of law will have implications for how the entity will be treated for purposes of tribal sovereign immunity and for federal income tax purposes.

Some organizational structures are more formal than others and do not require a lot of lead time to establish. For example, a key attribute of a tribal unincorporated entity or a tribal instrumentality is that it is relatively easy to form and can be established by tribal resolution or ordinance. If you are looking for simplicity, this is the entity—what it lacks in bells and whistles is made up for in its ease of formation, maintenance and dissolution. Ease of formation means minimal paperwork and negligible start-up costs. The tribal government is the owner and is in charge of making decisions. The biggest potential drawback is that tribal government assets and liabilities are not separated from the entity’s business obligations and liabilities.

Some entities take advance planning and time to form. A Section 17 corporation, like a Section 3 corporation, is a separate legal entity from the tribe. Section 17 and Section 3 corporations require carefully drafted organizational documents and navigation of the federal and tribal approval process. It takes quite a bit of lead time to obtain the required Secretary of the Interior approval and tribal ratification of a corporate charter. As separate legal entities, these corporations operate and are managed independently of a tribal government. The decisions are usually made by a board of directors separate from the tribal council.
Similarly, a tribal political subdivision takes some time and expense to form and then to obtain the necessary Bureau of Indian Affairs and Internal Revenue Service approvals. A political subdivision must be delegated one or more tribal governmental powers in order to be treated the same as the government itself for tax purposes.

Some entity forms give tribal governments a lot of flexibility in determining the management structure for an entity. For example, a tribe can determine the management structure of a tribal instrumentality, a political subdivision, or a tribal law corporation under its own law. In the case of other forms, such as a Section 17 corporation or a state law corporation, some requirements for organization and formation are determined under federal and state law, respectively.

A tribal law corporation, a state law corporation, or a tribal or state LLC—each require carefully drafted organizational documents and advance planning to form. However, the external approval process is generally much faster for these business entities than for political subdivisions or Section 17 corporations.

In addition, some organizational forms provide more protection for tribal government assets by segregating tribal business assets and liabilities from the tribal government. With these forms, the tribe itself is not liable for the debt and liabilities incurred by the corporation except to the extent it pledges assets or capital to the business entity. These include: a tribal corporation, a state law corporation, and a Section 17 corporation, as well as all types of LLCs.

2. **Relationship to Tribal Government**

The organizational form you chose will also dictate the relationship or degree of independence a business entity has from the tribal government. For certain business ventures, a tribe may want to create an entity that operates fairly autonomously from the tribal government and has the ability to attract the necessary technical and managerial expertise to run the day-to-day operations of the business. These can include: a tribal corporation, a state law corporation, and a Section 17 corporation.

If you want management to be more centralized with the tribal government, these forms should be considered: tribal instrumentality and unincorporated tribal entity.

Other types of business entities may involve the exercise of tribal governmental regulatory functions and may be more appropriately formed as instrumentalities or political subdivisions of a tribe. Examples include tribal utilities and telecommunications entities that provide services to an Indian reservation or provide other quasi-governmental services.

3. **Sovereign Immunity and Other Liability Issues**

Some business structures permit tribal governments to confer on the entity the tribe's sovereign immunity from suit and other governmental powers in its organizational
documents. These structures include: a tribal instrumentality or unincorporated business, a tribal political subdivision, a Section 17 corporation and Section 3 corporation.

The location of your business activities may also dictate what structure should be chosen. For example, for off-reservation business activities where sovereign immunity is a major concern for a tribal government, a federal Section 17 corporation may be the form that can best shield tribal assets. Additionally, an unincorporated tribal entity may also share the sovereign immunity of the tribe both for on and off-reservation activities. If a tribe incorporates under state law for off-reservation activities, it can be subject to suit based on the law under which it incorporates.

If a tribe wants to insulate tribal assets from debt obligations and liabilities of its business, it should consider forming a separate entity that can shield tribal assets through limited liability protection. This would include all forms of corporations--including a tribal law corporation, Section 17 corporation, Section 3 corporation, and a state law corporation.

As noted in the tribal corporation chapter, in certain situations, corporations organized under tribal law may share the organizing tribe’s sovereign immunity from suit. Courts have developed various methods to determine whether a tribe is immune from suit.

Both state chartered corporations and LLCs would most likely be treated as separate legal entities from the tribe and thus would not likely be viewed as sharing the tribe’s immunity from suit.

4. Tax Considerations

The IRS has consistently ruled that federally-recognized tribes are not subject to federal income taxes because they are not considered taxable entities. Therefore, any income earned by a tribe is not subject to federal income tax regardless of whether the business activity is on or off Indian-owned lands.

The IRS has ruled that unincorporated tribal entities, Section 17 corporations, and Section 3 corporations organized under the OIWA, are not taxable entities for purposes of federal income tax regardless of whether the business activity is on or off-reservation. Additionally, IRS practice has been to treat tribal political subdivisions like the tribe itself for federal tax purposes.

Section 7871 of the Tax Code treats Indian tribal governments and their political subdivisions like state governments for specific tax purposes. The key benefits include: exemption from certain excise taxes levied on fuels, manufactured goods, communications and certain highway vehicles and authority to issue tax-exempt bonds for facilities that serve an "essential governmental purpose."
In contrast, a wholly-tribally owned state chartered corporation is likely to be considered a separate taxable entity by the IRS, even when operating exclusively on-reservation.

As noted earlier, the federal tax treatment of tribally-chartered corporations is uncertain at this time. The IRS and Treasury Department indicated in 2001 that they would issue guidance on this issue, but have not yet done so. In the interim, many tribal advisors have ceased forming new tribally-chartered corporations, and some tribes have converted their tribally-chartered corporations to other types of business entities pending the IRS guidance.

Also, the IRS has not yet made a final determination on how tribal LLCs incorporated under state or tribal law will be treated under its check-the-box regulations. Under the regulations as they currently stand, a single member LLC is generally treated as a disregarded entity. Under this general rule, the IRS would treat a tribal single member LLC as sharing the same tax status as the tribe. At the same time, IRS regulations treat state or foreign government single member LLCs as per se corporations, and therefore potentially taxable. However, it has not made a similar determination for tribal governments. In the absence of a change in the regulations or some other formal IRS guidance, tribal advisors believe that a single member LLC owned by a tribe should be treated as a division of tribal government for tax purposes. An LCC with two or more members is treated like a partnership and a tribe’s share of income would generally flow through to the tribe free of tax.

B. Key Factors to Consider

1. Timing

If a short-time frame is required, the quickest and simplest entity to form is an unincorporated arm or instrumentality of the tribal government by tribal resolution or ordinance.

A tribal political subdivision maybe established under tribal law to carry out a substantial governmental or quasi-governmental function of the tribe, such as a business development, housing, or energy development. The formation of a political subdivision does require some lead time and expense to establish because of the required approvals by both the Bureau of Indian Affairs and the Internal Revenue Service.

Most corporations can be easily and quickly formed under the incorporation law under which they are established. A tribal law corporation would also require some lead time to draft a charter and incorporate under tribal law depending on the level of detail required under tribal incorporation law. The same is true for a state-chartered corporation or LLC.

Establishing a Section 17 or Section 3 corporation does require more advance planning and a substantial amount of time to get through the federal and tribal approval
process. A tribe must first draw up a petition and draft charter and submit it to the BIA for approval. BIA review and approval can take up to one year. After the BIA approves the charter, it needs to be ratified by the tribal council. BIA is currently in the process of streamlining the procedures.

2. Requirements of Business Partners and Lenders

Business partners may insist on entity types with which they are more familiar or which offer more certainty. Many business partners may not be familiar with tribal laws or of their ability to enforce tribal agreements under tribal law or in tribal courts. For these reasons, they may require incorporation under state or federal law.

A tribe operating as an arm or instrumentality of the tribal government may have difficulty obtaining conventional financing. Lenders may be reluctant to provide credit if they are not certain they can enforce their agreement due to the sovereign immunity of the tribe.

Only a wholly-owned tribal entity that is not legally separate from the tribe can be an issuer or borrower in a tax-exempt financing. Such entities include: an unincorporated tribal instrumentality, a tribal political subdivision, as well as a Section 17 and Section 3 corporation. When a subdivision or federal law corporation, and not the tribe itself, is the issuer/borrower, overly invasive disclosure of tribal financial records can be avoided. Since it is not clear whether a tribally chartered corporation will be treated like an integral part of the tribe for federal income tax purposes, it is also unclear whether such an entity can issue tax-exempt bonds.103

To be eligible for the Department of the Interior's Office of Indian Energy and Economic Development (IEED) Investment Capital Program, including its loan guarantee and loan insurance programs, at least 51% of the entity must be owned by a federally-recognized tribe.

Also, certain entity types do not lend themselves to equity financing or to ownership by multiple owners. If you plan on forming a business with multiple owners, this may exclude certain entity types from consideration--tribal unincorporated entities, political subdivisions, and federally-chartered corporations must be wholly-owned by the tribe.

An LLC organized under state law is an attractive entity for multiple owners and can preserve the non-taxable status of the tribe for federal income tax purposes. If a tribe is a member of an LLC with multiple members, the LLC will be treated as a partnership for tax purposes. Since income is allocated to each partner, the IRS has ruled that a tribe in a partnership is not subject to federal income tax. However, the IRS has cautioned that a tribally-owned state-chartered corporation that is a partner in a partnership would be subject to federal income tax for its distributive share of partnership income. Similarly, a state-chartered tribal LLC will not qualify as an issuer of tax-exempt bonds.
An LLC organized under tribal law could also permit multiple owners and could arguably share in the non-taxable status of the tribe for federal income tax purposes.

3. Anticipated Profitability

If the business entity is not anticipated to generate a significant amount of profits, the federal tax liability of the entity may be less of a factor to consider in choosing the entity type. For example, in the Qualco Case Study, the Tulalip tribes formed an energy power generation company which was driven by the off-reservation environmental interests of the tribes. The entity was established to promote and preserve the off-reservation fish habitat of the tribes and to promote long-term working relationships with local farmers--all profits generated by the entity are dedicated to habitat restoration. For these reasons, and to give certainty to their non-Indian business partners, the Tribe incorporated as a non-profit corporation under state law.

On the other hand, if you anticipate that the entity will generate substantial profits from either on or off-reservation activities, an unincorporated tribal entity or a Section 17 or Section 3 corporation may be your best entity option since the IRS has made a clear determination that these are not taxable entities for purposes of federal income tax.

For business activities exclusively on the reservation, a political subdivision of the tribal government may also be attractive if the business activity is quasi-governmental in nature.

As mentioned above, there is some uncertainty as to whether tribally-chartered corporations or single member LLCs will share the same tax status of the tribe.
<table>
<thead>
<tr>
<th>TYPE OF ENTITY</th>
<th>LAW GOVERNING FORMATION</th>
<th>SOVEREIGN IMMUNITY</th>
<th>LEGAL LIABILITY</th>
<th>FEDERAL TAX TREATMENT</th>
<th>FINANCING</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tribal Instrumentality and unincorporated entity</td>
<td>Tribal law, constitution, code, resolution or ordinance</td>
<td>Can share the same attributes of immunity as tribal government; immunity can be waived by tribe; waiver must be in accordance with tribal law</td>
<td>Tribal assets may not be segregated from entity; Tribal government may be liable for debts and obligations of tribal enterprise</td>
<td>Not subject to federal income tax (regardless of location of business activities) if the entity is not separate from the tribe.</td>
<td>Equity financing not possible; may qualify for tax-exempt financing if IRS requirements met; may be eligible for government guaranteed loans</td>
</tr>
<tr>
<td>Tribal Political Subdivision</td>
<td>Created under Tribal law through a special purpose ordinance or resolution to exercise one or more sovereign powers delegated by the tribe</td>
<td>Shares same attributes of immunity as tribal government; immunity can be waived by tribe</td>
<td>Whether tribal government is liable for debts and obligations of its political subdivisions would be determined under tribal law.</td>
<td>IRS practice has been to treat political subdivisions the same as the tribe—so long as they qualify as such by having been delegated substantial governmental powers</td>
<td>Can be both borrower and issuer of tax-exempt financing for facilities or operations that meet the essential governmental functions test; may be eligible for government guaranteed loans; can issue clean renewable energy bonds (CREBS)</td>
</tr>
<tr>
<td>TYPE OF ENTITY</td>
<td>LAW GOVERNING FORMATION</td>
<td>SOVEREIGN IMMUNITY</td>
<td>LEGAL LIABILITY</td>
<td>FEDERAL TAX TREATMENT</td>
<td>FINANCING</td>
</tr>
<tr>
<td>-----------------------------</td>
<td>----------------------------------------------------------------------------------------</td>
<td>-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Tribally Chartered Corporation</td>
<td>Tribal law, constitution, code, resolution or ordinance</td>
<td>A corporation that operates independent from the tribal government may not share the immunity of the tribe (multi factor test).</td>
<td>A wholly owned tribal corporation should make clear in its organizing documents that the tribal shareholder is not liable for debts of the corporation except to the extent of its contributed capital or the shares it owns.</td>
<td>Tax treatment is uncertain. In, 2001, the IRS and the Treasury Department agreed to resolve the uncertainty by issuing guidance but have not yet done so. For this reason, many tribal advisors have ceased creating new tribal law corporations.</td>
<td>It is not clear whether tribal law corporations can issue tax exempt bonds. Government guaranteed loans, taxable bond issuances, private placements, commercial bank financing available.</td>
</tr>
<tr>
<td>Section 17 Corporation</td>
<td>Federal charter issued under the Indian Reorganization Act</td>
<td>Corporate charter can confer the same privileges and immunity as tribe; waivers of sovereign immunity pursuant to the &quot;sue and be sue clause&quot; in the corporate charter should be limited to a waiver of only the corporation’s sovereign immunity and such waiver should be restricted in scope to transactions of the corporation and limited to claims against the assets of the corporation and not the tribe itself.</td>
<td>Assets and liabilities of the corporation are segregated from tribal government assets; Tribal government can pledge assets or property to the corporation; tribal government is not liable for debts or obligations of the corporation.</td>
<td>Not subject to federal income tax regardless of location of business activities</td>
<td>Section 17 Corporation can pledge assets and property of the corporation; is eligible for government guaranteed loans; can issue tax exempt bonds for &quot;essential governmental services&quot; and can issue clean renewable energy bonds; joint ventures or equity partnerships possible through a LLC subsidiary chartered under a Section 17 corporation.</td>
</tr>
</tbody>
</table>

CHART: STRUCTURE AT A GLANCE
<table>
<thead>
<tr>
<th>TYPE OF ENTITY</th>
<th>LAW GOVERNING FORMATION</th>
<th>LEGAL LIABILITY</th>
<th>SOVEREIGN IMMUNITY</th>
<th>FINANCING</th>
</tr>
</thead>
<tbody>
<tr>
<td>State Law Corporation</td>
<td>Created under state law for-profit or nonprofit purposes</td>
<td>Assets and liabilities of the corporation are segregated from tribal government assets; tribal government cannot pledge assets or property to the corporation; tribal government is not liable for debts or obligations of the corporation</td>
<td>Need to look at state law to determine power to sue and be sued</td>
<td>Does not qualify as an issuer of tax-exempt bonds or clean renewable energy bonds.</td>
</tr>
<tr>
<td>State Chartered Limited Liability Company</td>
<td>Created under state law</td>
<td>Has advantage of limited liability like a corporation; Tribe is not liable for debts or liabilities of LLC.</td>
<td>A single member LLC owned by a tribe would likely be considered a separate legal entity for purpose of legal process and thus not likely to be viewed as sharing the tribe’s immunity from suit</td>
<td>Does not qualify as an issuer of tax-exempt bonds or clean renewable energy bonds.</td>
</tr>
<tr>
<td>Federal Tax Treatment</td>
<td>IRS has taken position that a state chartered tribal corporation does not share the same tax status as the tribe and therefore taxable.</td>
<td>Taxed like a partnership or other “flow through” entity. IRS has not ruled on treatment of tribal single member LLC in the absence of a rule that tribal advisors believe that a tribal LLC should be treated as a division of tribal government for tax purposes.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
SOVEREIGN IMMUNITY FACTORS IN RECENT JUDICIAL DECISIONS

In determining whether a tribal enterprise or business entity shares the tribe's immunity from suit, courts typically consider a number of factors, including but not limited to the following:

- Whether a judgment against the tribal entity will reach the tribe's assets
- Whether the tribal entity has the power to bind the tribe's assets or to obligate tribal funds
- Whether the tribe and the tribal entity are closely linked through governance structure and other characteristics (e.g., tribal control over appointment and removal of entity board members, extent of board's power over the entity's operations)
- Whether federal Indian law policies intended to promote tribal self-determination would be furthered by extending immunity to the entity
- Whether the entity is organized for governmental or for "commercial" purposes
- Whether the entity holds title to property in its own name
- Whether the entity is legally separate and distinct from the tribe (e.g., as is normally the case with a separately incorporated entity).

In several jurisdictions, the main factors that determine whether a tribal enterprise or entity shares the parent tribe's sovereign immunity are (1) whether a judgment against the entity will reach the tribe's assets, and (2) whether the entity has the power to bind the tribe's assets or obligate the tribe's funds.\(^{104}\) In some jurisdictions, if the answers are "no," the inquiry ends. Tribal entities that generate their own revenue and cannot bind or obligate tribal funds cannot lay claim to tribal sovereign immunity.\(^{105}\) In others, these are just two factors to consider.\(^{106}\)

Another key factor is whether the tribe and the tribal entity, such as an entity, are closely linked in governing structure and other characteristics. Courts typically analyze the corporation's board of directors, including its composition, how its members are chosen, and the tribe's control over the procedure for their removal.\(^{107}\) If the corporation's board of directors is separate from the tribal government so that the board exercises full managerial control over the corporation, the corporation is more likely to be considered a separate and distinct entity that does not share the tribe's immunity. Also relevant is the level of control the tribe retains over appointing and removing board members. The less control the tribe has, the less likely a finding in favor of immunity.
Another factor typically analyzed is whether federal policies intended to promote Indian tribal autonomy are furthered by extending immunity to the entity. Examples of applicable federal policies include protecting tribal assets; protecting tribal cultural autonomy; promoting commercial dealings between tribes and non-Indians; and promoting tribal self-determination. A finding that extending immunity to the entity would support some or all of these policies weighs in favor of a finding that it shares the tribe's immunity.

The nature of the entity's purpose is also given weight by several courts, but in varying amounts. Courts typically enquire whether the entity was organized for governmental or commercial purposes. However, the distinction between the governmental and commercial purposes is not always clear. For example, a tribal entity organized to operate tribal gaming enterprises was held to be organized for a "governmental purpose," based on the Indian Gaming Regulatory Act's goal to encourage tribal self-determination and its restrictions on the uses to which gaming revenues can be put. By contrast, a for-profit corporation formed to carry out construction projects was considered to have a commercial purpose. While court determinations are difficult to predict, tribal entities that deal with traditional government functions, such as health, education, and the welfare of tribal members, are more likely to be considered "governmental," than for-profit entities whose primary activity is conducting an off-reservation business.

Several other factors are relevant in determining a tribal entity's ability to exercise sovereign immunity. The first is whether the entity holds title to property in its own name. Evidence that the tribe holds title to the entity's property weighs in favor of a finding of sovereign immunity. The second is whether the entity is incorporated. In at least one court, the fact that a tribal entity is incorporated provided the court with strong evidence that the entity is separate and distinct from the tribe and therefore cannot share its immunity. Clearly, if extended, this reasoning would preclude all tribal corporations from exercising sovereign immunity. At this point, however, it is just one of the factors considered.

In conclusion, the guiding principle is that the closer and more inter-connected the tribe is with the tribal entity, the more likely it is that the entity shares the tribe's immunity, particularly if the entity's purpose relates to core governmental functions.
KEY STEPS TO PROTECT THE CORPORATE VEIL
AND TO LIMIT LIABILITY

- **Adequate capitalization.** Adequately capitalize the corporation. Do not allow the corporation to be financially dependent on the parent/shareholders for working capital.

- **Compliance with legal requirements for issuance of stock.** Make sure stock is issued and that you have complied with applicable legal requirements relating to issuance of a security.

- **Maintenance of corporate records.** Maintain corporate records, including minutes of shareholders' and directors' meetings held at least annually.

- **Maintenance of separate financial records and bank accounts.** Maintain separate financial records for each subsidiary. Keep balance sheets and profit and loss statements for each year. Maintain separate bank accounts for each subsidiary and parent.

- **Avoidance of inter-corporate loans.** Make few loans between the parent and the subsidiary. Document all loans made and make payments in accordance with the repayment terms.

- **No guarantees by tribe of subsidiary's debt.** The parent entity (e.g., the tribe) should not generally assure corporate creditors that it will take care of subsidiary obligations if the subsidiary is unable to do so.

- **No assignment of contracts between tribe and subsidiary.** Make sure that contracts that are intended to bind only the subsidiary are only in the name of the subsidiary. Don't put them in the name of the parent and then assign to the subsidiary.

- **No representation that the entity's primary purpose is to limit liabilities.** Never suggest to a third party that the entity was created for the purpose of limiting the legal remedies or assets available to third parties.

- **Maintenance of adequate insurance.** Maintain appropriate insurance coverage for the subsidiary's insurable liabilities.

- **No interlocking or identical boards.** Avoid having the same group of individuals serve as officers and/or directors of both the parent and the subsidiary.


8 Barker v. Menominee Nation Casino, 897 F. Supp. 389, 391 (E.D. Wis. 1995) (Menominee Casino operated by the Menominee Tribal Gaming Commission a wholly-owned chartered business venture of the tribe created by ordinance pursuant to the Constitution and By-laws of the tribe); Pueblo of Santa Ana v. Hodel, 663 F. Supp. 1300, 1302 (D.C.C. 1987) (Santa Ana Enterprise created by tribal ordinance passed by the traditional government of the Pueblo).

9 Unique v. Gila River Pima-Maricopa, 674 P.2d 1376, 1382 (Ariz. App. 1983) (Gila River Farming venture was a subordinate economic entity of the tribe and not part of its corporate entity).

10 Donovan v. Navajo Forest Products Industries, 692 F. 2d 709, 710 (10th Cir. 1982).


16 Id. At 760.


18 Id.

19 Navajo Tribe v. Bank of New Mexico, 700 F.2d 1285 (10th Cir. 1983).

20 Gaines v. Ski Apache 8 F. 3rd 726, 729 (10th Cir. 1993); In re Greene, 980 F. 2d. 590, 593 (9th Cir. 1992); Barker v. Menominee Nation Casino, 897 F. Supp. 389, 393 (E.D. Wis. 1995).


Rev. Rul. 57-128, 1957-1 C.B. 311. The Service's "instrumentality" test does not generally apply for income tax exemption, but it is utilized for other tax purposes. See, e.g., PLR 200621010 (Feb. 1, 2006) (entity treated as instrumentality of a Tribe for purposes of Code Section 7871(a) (ability to receive charitable contributions).


The USDA B&I regulations can be found at http://www.rurdev.usda.gov/.

The SBA 7(a) regulations can be found at 13 CFR. 120 and http://www.sba.gov/services/financialassistance/sbaloantopics/7a/index.html.


See, e.g., Rev. Proc. 84-37, 1984-1 C.B. 513 provides procedures for a political subdivision of an Indian tribal government not included on the list published in Rev. Proc. 84-36 to request a ruling qualifying it for treatment as a political subdivision as provided under Section 7871(d) of the Tax Code.


In Private Letter Ruling 200148038 (Aug. 30, 2001), the IRS held that a local governing body that delegated certain police powers over local tribal matters was a political subdivision of an Indian tribal government. The local governing body was formed by a committee of the governing body of an Indian tribe and delegated police powers. The local body provided 24-hour law enforcement and detention services on the reservation. It also was permitted to adopt certain ordinances, including ordinances to amend the land use plan; to acquire property by eminent domain; zoning ordinances; ordinances for the enforcement of general health, safety, and welfare of the community; and local taxes. IRS reasoning focused on the fact that the local governing body had been delegated substantial governmental powers. In ruling that the local body qualified as a political subdivision of the Indian tribe, the IRS stated that the Department of Interior had opined that the Indian tribe effectively delegated sovereign powers to the local body. Accordingly, after consultation with the Secretary of Interior, the IRS concluded that the Authority was a political subdivision for purposes of Section 7871 of the Code. See also PLR 200635002 (Sep. 1, 2006), supra note 31 and accompanying text.
Treas. Reg. § 301.7701-1(a)(3) ("tribes incorporated" under Section 17 of the IRA of Section 3 of the OIWA are "not recognized as separate entities for federal tax purposes"). In referring to “tribes incorporated” under Section 17, the IRS regulations are following the statutory language of 25 U.S.C. § 477, which refers to the “incorporated tribe”. Cf. § 301.7701-2 (b)(1) (defining a corporation to include any business entity organized under a federal, state or tribal statute if the statute refers to the entity as incorporated).

See Treas. Decision 8697, 61 Fed. Reg. 66585 (Dec. 17, 1996). However, in regulations issued in 1997 under Internal Revenue Code section 337(d), the IRS limited the definition of tax-exempt Indian tribal corporations to those incorporated under federal law--specifically, section 17 of the IRA and section 3 of the OIWA. (See Treas. Reg. §1.337(d)-4(c)(2)(v).


PLR 200031045 (May 9, 2000) (a nonprofit corporation created pursuant to a city ordinance); and PLR 200112013 (Dec. 14, 2000) (a tribally-chartered authority created by a Tribe to construct and manage its gaming business).

See Oklahoma Tax Commission v. Chickasaw Nation, 115 S.Ct. 2214 (1995) (noting the Oklahoma Tax Commission’s current policy with regard to the sales and use tax exemption applicable to Indian tribes).

See Code section 7871(c). However, in some private letter rulings, the IRS has stated or implied that such debt may also be issued by "an integral part of an Indian tribal government." See PLR 9826005 (June 26, 1998) (concluding that a state-chartered nonprofit corporation did not qualify as an "integral part" or a political subdivision of an Indian tribe, and thus could not issue tax-exempt bond). See TAM 9013002 (March 30, 1990) (activities of certain subsidiaries of a tribe, such as logging, agricultural and general retail operations, are not essential governmental functions, even though such subsidiaries provide funding to tribal government programs which in turn provide essential governmental functions).


Id.; Specific laws affect the governmental authority of the Osage and Five Civilized Tribes of Oklahoma.


See BIA Model Charter Art. VII K. and Art. XVI (modifies “sue and be sued clause” so it subject to provision on immunity).

25 USC § 476 provides that the tribe must consent to transfer of tribal assets.


PLR 9847018 (November 20, 1998) (citing Rev. Rul. 94-16 “that Section 17 Corporation has the same tax status as the tribe.").


PLR 9826005 (March 20, 1998). In the ruling, the IRS also concluded that the corporation was not a political subdivision of the tribe since there was no evidence it had been delegated any sovereign or governmental powers.


There are certain exceptions to this general rule. For instance, an LLC that engages in public trading of its interests will be treated as an association taxable as a corporation.

There is one important caveat. Unlike partnership laws, which have some uniformity across states, LLC laws have not attained such uniformity, and as such, there are significant differences in the LLC laws of different states. Thus, an LLC that wishes to conduct business in a state other than its state of organization should closely review the LLC status of that state to determine whether the statute extends the expected treatment to foreign (i.e., out-of-state) LLCs.

There are certain exceptions to this general rule. For instance, an LLC that engages in public trading of its interests will convert to an association taxable as a corporation. Similarly, certain states that do not recognize the non-taxable nature of LLCs, partnerships and other flow-through entities.

There is one important caveat. Unlike partnership laws, which have some uniformity across states, LLC laws have not attained such uniformity, and as such, there are significant differences in the LLC laws of different states. Thus, an LLC that wishes to conduct business in a state other than its state of organization should closely review the LLC status of that state to determine whether the statute extends the expected treatment to foreign (i.e., out-of-state) LLCs.

Some states, including California, require limited partnerships to pay an annual "fee" of several hundred dollars for the privilege of doing business in California; other states, such as Illinois, may impose an income tax at the entity level.


Id.


Treas. Reg. § 301.7701-2(b)(6).

Certain rules apply to determine when such income will be recognized or included in the partner's gross income.

In Rev. Proc. 1993-27, 1993-2 C.B. 343, the IRS noted that a profits interest received in exchange for the provision of services to a partnership would not be treated as taxable income to the partner unless: (i) the interest relates to a substantially certain or predictable stream or income; (ii) the partner disposes of the interest within two years; or (iii) the interest is a limited partnership interest in a "publicly traded" partnership. See also Rev. Proc. 2001-43, 2001-2 C.B. 191.

Where the partnership agreement does not provide for such allocations, the distributive shares are determined according to the partners' interest in the partnership.

The UBTI rules come into play only when a tribe operates a tribal college or university. See Code Sections 7871(a)(5) and 511(a)(2)(B).

The recently enacted Energy Policy Act of 2005 provides for tax-credit financing of “clean renewable energy facilities” by tribal governments and their political subdivisions.


See, e.g., Dixon, 772 P.2d at 1107-08, 1109.

See, e.g., Id. at 1111-12; Trudgeon v. Fantasy Springs Casino, 71 Cal. App. 4th 632, 642 (1999).

See, e.g., Galve v. Little Six, Inc., 555 N.W.2d 284, 294 (Minn. 1996).

Id. at 294-95; Trudgeon, 71 Cal. App. 4th at 639-40.

Dixon, 772 P.2d at 1110-11.


Dixon, 772 P.2d at 1110-11.
IMPROVING NATIVE AMERICAN ACCESS TO FEDERAL FUNDING FOR ECONOMIC DEVELOPMENT THROUGH PARTNERSHIPS WITH RURAL COMMUNITIES
32 Am. Indian L. Rev. 525

http://www.jstor.org/stable/20700721?seq=1#page_scan_tab_contents
Panel Two – Changing Futures

Dollar General v. Mississippi Choctaw Band and the Future of Tribal Courts

Dale White, Esq.
I. “TRIBAL COURTS 101”

A. Development of Independent Tribal Judicial Systems

1. Before European contact tribes maintained law and order through various means (tribal leaders, elders)
   a. Indian Reorganization Act of 1934
   b. Self Determination Act in 1970s
   c. Development of independent tribal courts has occurred within last 50 years

2. General status of tribal courts today
   a. Over 150 tribes have independent tribal judicial systems
   b. Tribal judicial systems vary from tribe to tribe
   c. Many look very much like non-Native courts
   d. Some rely on unwritten tribal laws and customs
   e. Many tribes have written Law and Order Codes
   f. Also rules that govern court procedures, hiring of judges, etc.

3. Tribal Courts handle a variety of matters
   a. Family law issues (divorce, custody, probate)
   b. Complaints for protective orders and harassment
   c. Indian Child Welfare Act cases (for children residing or domiciled on reservation)
   d. Civil disputes (tort and contract actions)
   e. Violations of tribal ordinances
   f. Restraining orders
   g. No criminal jurisdiction except as granted in Violence Against Women Act reauthorization in 2013
B. Unsettled Issue is Jurisdiction over Non-Members in Civil Matters
1. Tribal courts unquestionably have jurisdiction over their own tribal members
2. Until late 1970s it was assumed that tribes possessed civil regulatory authority over non-members
   a. Precedent in earlier tax cases
3. This changed with Montana v. United States, 450 U.S. 544 (1981) decision
   a. Court ruled that civil authority over non-members is one of the powers that tribes have lost (were divested of) as consequence of domestic dependent status
   b. There are two exceptions to that general rule
      i. Non-member has consensual relationship with tribe or tribal member
      ii. Non-member’s conduct threatens tribe or member
4. Issue of tribal court (adjudicatory) jurisdiction had not been squarely addressed or resolved by Supreme Court
   a. Several cases in Supreme Court involving tribal court authority
   b. But none of the cases has directly answered the question of tribal court jurisdiction over non-members
5. Two cases--National Farmers Union Ins. Co. v. Crow Tribe, 468 U.S. 1315 (1984) and Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987) were decided on “tribal court exhaustion” grounds
   a. Neither case reached the merits of tribal court authority over non-members
   a. Court found no tribal court jurisdiction based unique facts—issue of alienation of fee lands outside of tribal court’s authority

II. THE DOLLAR GENERAL CASE

A. Dollar General Corp. v. Mississippi Band of Choctaw Indians, No. 13-1496 (U.S. Supreme Court)
   1. Argued December 7, 2015
      a. As of 2/16/16 no decision
   2. Could be case where Supreme Court finally decides issue of tribal court jurisdiction under Montana case standards
   3. Has attracted considerable media and scholarly attention

B. BACKGROUND OF CASE
   1. Dollar General Corp.
      a. Huge national retail corporation
      b. 11,500 stores in 40 states
      c. Store on Mississippi Choctaw Reservation
         i. On reservation trust lands
2. Incident Leading to Case
   a. Sometime in 2003 the manager of Dollar General store hired a tribal youth (13-year old)
   b. Under a tribal youth program
   c. Allegation is that store manager sexually molested the youth

3. Tribal Court Action
   a. Action filed by parents in tribal court in 2005
   b. Dollar General’s motion to dismiss denied
   c. Tribal Court held that it had jurisdiction

4. Federal Court Action
   a. Dollar General brought federal court action challenging tribal jurisdiction
   b. U.S. District Court decision upheld tribal court jurisdiction in 2011
   c. Fifth Circuit (divided panel) affirmed in 2013 (amended opinion in 2014)
   d. Supreme Court granted certiorari

C. PARTIES’ ARGUMENTS

1. Certiorari Petition Issue:
   “Whether Indian tribal courts have jurisdiction to adjudicate civil tort claims against non-members, including as a means of regulating the conduct of non-members who enter into consensual relationships with a tribe or its members”

2. Dollar General’s arguments
   a. Focuses almost entirely on argument that there is no tribal court jurisdiction at all over non-members absent a grant from Congress
   b. Explains Court has avoided ruling on issue of tribal adjudicatory authority because cases have dealt with tribal regulatory (legislative) authority
   c. Argues that the “consensual relationship” exception in Montana allows “civil jurisdiction” through taxation, licensing or “other means”
   d. But, tribal court jurisdiction based on unwritten tort law is not covered as “other means”

3. Mississippi Choctaw Band’s arguments
      (i) Non-members subject to tribal civil jurisdiction in two instances—
         a) Right of tribe to condition entry
         b) Where there is consent
      consent must have a nexus to relationship itself (tribe can’t regulate third party relationship—hotel and its guest)
   c. The Montana rule applies to adjudicatory jurisdiction—not only regulations like taxation and licensing
   d. The consent trigger in the case is Dollar General’s participation in the tribal youth program
e. Dollar General’s argument urging a rule like *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) fails for two reasons
   (i) Not raised below

III. THE IMPORTANCE AND IMPACT OF A DECISION IN DOLLAR GENERAL

A. Practical Impact of a Decision in Dollar General
1. Will only affect a small percentage of cases handled by tribal courts
2. As noted above, tribal courts handle a variety of cases
   a. Most of those cases involve tribal members
   b. Very few involve non-members
3. Disputes involving tribal business partners are often resolved in contracts (state court jurisdiction, arbitration, sometimes tribal courts)
4. Major impact will be for “routine” civil disputes—torts and contract disputes not covered by agreements

B. To a Large Extent the Damage Has Already Been Done
1. Tribes have already lost criminal authority over non-members (except as granted in VAWA)
2. And, under *Montana*, tribal civil authority over non-members is already greatly limited
   a. Need to show consent
   b. Or severe threat
3. So, to a large extent the damage has already been done to tribal court authority over non-members
5. Even a “win” in Dollar General would not authorize tribal court jurisdiction over “non-consented” civil disputes—torts and other routine civil disputes

C. Post-Dollar General Future of Tribal Courts
1. Tribal courts will continue to play a significant role in overall judicial system
   a. Will continue to grow and evolve with current caseload
   b. Funding is needed
2. Tribes will need to work out a strategy to deal with non-members
   a. Get consent when they can
   b. That will be difficult in many instances that are not conducive to consent—torts for example
   c. Perhaps invoke power to exclude non-members?
3. Continue to improve tribal courts—experienced judges, accessible, codified laws
In The
Supreme Court of the United States

DOLLAR GENERAL CORPORATION, ET AL.,

Petitioners,

v.

MISSISSIPPI BAND OF
CHOCTAW INDIANS, ET AL.,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

BRIEF AMICUS CURIAE OF THE
SOUTH DAKOTA BANKERS ASSOCIATION
IN SUPPORT OF PETITIONERS

BRETT KOENECKE
Counsel of Record
A.J. FRANKEN
MAY, ADAM, GERDES & THOMPSON LLP
503 S. Pierre Street
P.O. Box 160
Pierre, SD 57501
(605) 224-8803
brett@mayadam.net
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>INTEREST OF THE AMICUS CURiae</td>
<td>1</td>
</tr>
<tr>
<td>SUMMARY OF ARGUMENT</td>
<td>1</td>
</tr>
<tr>
<td>ARGUMENT</td>
<td>2</td>
</tr>
<tr>
<td>CONCLUSION</td>
<td>14</td>
</tr>
</tbody>
</table>
# TABLE OF AUTHORITIES

<table>
<thead>
<tr>
<th>Case</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Doe v. Dollar General Corp., No. CV-02-05</td>
<td></td>
</tr>
<tr>
<td>(S. Ct. of Miss. Band of Choctaw Indians 2008)</td>
<td>8</td>
</tr>
<tr>
<td>Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 732 F.3d 409</td>
<td>3, 7, 8</td>
</tr>
<tr>
<td>(5th Cir. 2014)</td>
<td></td>
</tr>
<tr>
<td>Duro v. Reina, 495 U.S. 676 (1990)</td>
<td>1, 3, 4</td>
</tr>
<tr>
<td>Lee v. Her Many Horses, 2014 U.S. Dist. LEXIS</td>
<td>6</td>
</tr>
<tr>
<td>42626 (D.S.D. Mar. 30, 2014)</td>
<td></td>
</tr>
<tr>
<td>Nevada v. Hicks, 533 U.S. 353 (2001)</td>
<td>3, 4</td>
</tr>
<tr>
<td>Plains Commerce Bank v. Long Family Land &amp; Cattle Co., Inc., 554 U.S.</td>
<td>2, 3, 7, 9, 12</td>
</tr>
<tr>
<td>316 (2008)</td>
<td></td>
</tr>
</tbody>
</table>

| Statutes                                                             |      |
| 25 U.S.C. § 1304                                                    | 10   |
**TABLE OF AUTHORITIES – Continued**

**OTHER AUTHORITIES**


INTEREST OF THE AMICUS CURIAE

The South Dakota Bankers Association ("SDBA") is a voluntary association of banks doing business in South Dakota. It has 86 member banks located throughout South Dakota, including numerous banks located on or near one of South Dakota's numerous Indian reservations. SDBA wishes to offer its views on the effect that an expansion of the "Montana exceptions" to the general rule that Indian tribes do not have regulatory or civil-adjudication over non-members will have on SDBA's members and on the communities (both on-reservation and off) which they serve.

SUMMARY OF ARGUMENT

Uncertainty as to the rules of the "economic game" leads to reluctance on the part of off-reservation businesses to transact business on Indian reservations or with Indians who live on reservations. The reluctance is understandable given the "special nature of [Indian] tribunals." Duro v. Reina, 495 U.S.

---

1 The parties have consented to the filing of this brief, and their consent forms have been filed with the court. No counsel for either party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparations or submission of this brief. No person other than amicus curiae SDBA, its members or its counsel made a monetary contribution to its preparation or submission.

676, 693 (1990). The decision of the Fifth Circuit Court of Appeals in this matter eliminates important limitations to jurisdiction set by this Court in *Montana*. In a legal landscape already difficult for outsiders to navigate, the decision below injects greater uncertainty as to the rules of the game and increases the risks of doing business with tribes or tribal members who reside in Indian country. The net result of this uncertainty and risk will be further economic hardship for those living on and near Indian reservations.

---

**ARGUMENT**

In its amicus brief to this Court in *Plains Commerce*, the SDBA noted that lack of predictability as to future events is detrimental to the economy in general and to credit markets in particular. Brief for American Bankers Association and South Dakota Bankers Association as Amici Curiae Supporting Petitioner, *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316 (2008) (No. 07-411). At that time, SDBA asserted that uncertainty concerning the nature and extent to which tribal courts may exert jurisdiction over non-Indians can result in similarly injurious economic consequences. *Id.* at 2-3. That assertion remains true today. A primary source of reluctance on the part of non-Indian businesses to doing business on reservations is difficulty in determining and understanding “the rules of the game.” The Fifth Circuit’s decision in this matter exacerbates the uncertainties and risks of
doing business in Indian country by expanding tribal court jurisdiction to include the adjudication of tort claims against non-Indian defendants for punitive damages. *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 732 F.3d 409, 418-19 (5th Cir. 2014).


The proposition that uncertainty regarding the jurisdictional reach of tribal courts poses potential problems for non-Indians seeking to transact business in Indian country is well-recognized. As Justice Souter noted in his concurrence in *Nevada v. Hicks*, “[t]he ability of nonmembers to know where tribal jurisdiction begins and ends . . . is a matter of real, practical consequences given '[t]he special nature of [Indian] tribunals . . .' ” 533 U.S. 353, 383 (2001) (quoting *Duro*, 495 U.S. at 693) (Souter, J., concurring). This is true because of the uncertainty associated with the varying structure of Indian tribunals, the uncertainty associated with the substantive law they may apply and the varying levels of independence enjoyed by the judges of those tribunals. *Hicks*, 533 U.S. at 384 (Souter, J., concurring). This is also true, at least in part, because non-members generally cannot vote in tribal elections, and thus can never have a voice in changing procedural rules, substantive law
or other matters involving Indian tribunals with which they disagree. See Duro, 495 U.S. at 679.

In Hicks, Justice Souter noted the unique challenges facing an outsider attempting to grasp the applicable law in tribal court:

[tribal law is still frequently unwritten, being based instead on the 'values, mores, and norms of a tribe and expressed in its customs, traditions, and practices,' and is often 'handed down orally or by example from one generation to another'... The resulting law applicable in tribal courts is a complex 'mix of tribal codes and federal, state, and traditional law,'... which would be unusually difficult for an outsider to sort out.

533 U.S. at 384 (Souter, J., concurring). Interpreted in conjunction with tribal "customs, traditions, and practices," even readily-available written tribal ordinances and resolutions may take on a wholly different meaning from comparable state or federal statutes.

This case involves an area of law that is even more difficult for "an outsider to sort out" — that body of law not set forth in statute or written tribal regulation. Even where precedent exists, much of that precedent may be inaccessible from a practical perspective. Unlike the decisions of the highest state courts, many tribal court decisions are not available
to the public in any indexed or searchable format. Most are not available through the leading legal research publishers. Accordingly, the ability for an "outsider" to use and rely on tribal precedent to guide its actions and determine risks is greatly limited by the ability to find precedent.

On top of these challenges, non-Indian defendants are also often confronted with tribal judicial systems that are underfunded, lack adequately-trained staff, and lack judicial independence. In this regard, the Mississippi Band of Choctaw Indians, with a robust economy and well-developed court system, is not representative of the governmental

---

3 Efforts by third parties to compile tribal court decisions to enhance accessibility are admirable, but often fall short. For example, a compilation of Rosebud Sioux Tribal Court Decisions is maintained by the Sicangu Oyate Bar Association on that organization's website. This is a valuable resource to those wading into law in the Rosebud Courts. Yet, at the time of this writing, the list of decisions had not been updated since 2011. See Sicangu Oyate Bar Association, Appellate Decisions, http://sicanguoyatebar.org/appellate-decisions/ (last visited Sept. 1, 2015).

and judicial realities in other parts of Indian Country. Chief Judge Ralph R. Erickson, from the District of North Dakota, offers a description more indicative of tribal courts in the Upper Midwest, when he states that tribal courts are "overwhelmed by problems rising out of a lack of adequate funding, a lack of adequately trained personnel, and a lack of true judicial independence." He goes on:

To describe the overall state of the facilities available to the tribal courts as wanting is an understatement. The Court recognizes that many of the tribes have taken herculean efforts to make do with judicial resources that state and federal courts would deem create a constitutional crisis. In short, many

---

4 Recent decisions from South Dakota offer glimpses into the types of political struggles that embroil tribal judicatories where there exists inadequate judicial independence. See, e.g., Wright v. Langdeau, 2015 U.S. Dist. LEXIS 76307, *2 (D.S.D. June 10, 2015) ("In December of 2014, a tribal council meeting was held wherein Plaintiffs were attempting to ascertain the whereabouts of roughly $24 million in federal funding and how it could be that the current chief tribal judge was seated after allegedly being defeated in the election process."); Lee v. Her Many Horses, 2014 U.S. Dist. LEXIS 42626, *2 (D.S.D. Mar. 30, 2014) ("The amended complaint seeks a writ of mandamus against all the defendants and includes the following request for relief: (1) protection for Mr. Lee, as Chief Judge of the Oglala Sioux Tribal Court, from removal by the Oglala Sioux Tribe ("OST") Tribal Council; (2) protection for Rhonda Two Eagles, as OST Tribal Secretary, from removal by the OST Tribal Council; (3) protection for Mr. Bislecki from removal from the Pine Ridge Indian Reservation by the OST Tribal Council; (4) protection of the Treaty Council Members from arbitrary arrest. . . ").
tribal courts are so short of resources and personnel that they constitute a national embarrassment.

*United States v. Covanaugh*, 680 F. Supp. 2d 1062, 1072-73 (D.N.D. 2009). Although jurisdiction may not hinge on the transparency, accessibility, or effective functioning of the tribal legal system, this is the backdrop of uncertainties already facing outsiders, to which the decision below adds further unpredictability and greater risk.

The Fifth Circuit’s decision removes a powerful limitation on the extent of tribal jurisdiction over non-Indians set forth in *Montana*: that tribes may only regulate non-Indian conduct “to the extent necessary” to control internal relations. *Plains Commerce*, 554 U.S. at 332. The decision below concedes that “the tribe cannot impose any conceivable regulation on a business simply because it is operating on a reservation and employing tribe members.” *Dolgen-corp*, 732 F.3d at 417. Yet, then the court then sets forth a standard under which tribal courts may impose theoretically unlimited punishment upon a non-Indian defendant in tort law, so long as there exists some nexus between the activity or person regulated and a consensual relationship with the tribe or its members. *Id.* at 415-17. The decision expands the regulatory power of the tribe, with regard to who and what fall under the tribal court’s jurisdiction, and perhaps more importantly, how the tribe may impose punishment as a method of control over
those persons and activities. The decision renders the important limitations of *Montana* meaningless.

Where and against whom jurisdiction lies are important questions as banks and other entities assess the costs and benefits of doing business on a reservation. The nexus described by the Fifth Circuit needed to determine these questions sets forth a broad and ill-defined test for the assumption of tribal jurisdiction. *Dolgencorp*, 732 F.3d at 415-17. Under the lower court decision, the vague standard of foreseeability is used to determine whether a non-Indian defendant may be regulated by a tribe. The court opines that "a business operating on Indian land in a reservation is unlikely to be surprised by the possibility of being subjected to tribal law in tribal court." *Id.* at 415, n. 4. The test offers little guidance to non-Indians considering doing business with reservation Indians or tribes as to the extent that one business activity may trigger all forms of tribal authority over all persons or activities in any way related to that business on the reservation. For example, many tribes require non-Indian businesses to be licensed to operate on their reservation. Could applying for a business license make it "foreseeable" that the non-Indian business could be brought before tribal court for *any* act?\(^6\) Could a tribal court determine that it

---

\(^6\) The Supreme Court of the Mississippi Band of Choctaw seems to indicate that the answer to this question, under its interpretation of *Montana*, is a certain "yes," regardless of the act which gave rise to the dispute – so long as an act is committed on Indian land. *Doe v. Dollar General Corp.*, No. CV-02-06 (Continued on following page)
has jurisdiction over an employer for claims arising from of its employee’s off-duty tortious acts on the reservation, if the employee would not have been on the reservation but for the business? Although such a claim would not be likely in state court, the foreseeability of the use of such an action under tribal law, incorporating traditions and customs, is difficult to determine.

Equally important is how the tribe exerts power in its attempt to “regulate” those entities and activities. “Montana expressly limits its first exception to the activities of nonmembers, allowing these to be regulated to the extent necessary to protect tribal self-government [and] to control internal relations.” Plains Commerce, 554 U.S. at 332 (internal citations and quotations omitted) (emphasis added). The phrase “to the extent necessary” should be interpreted to place limits on the type and degree of “regulation” – or in this case, punishment – imposed upon non-Indians. Jurisdiction over claims for punitive damages, as the form of regulation presented in this case, in essence allows a tribal court to impose any degree of financial punishment on a non-Indian defendant. Punitive damages may be, and probably are, unchecked by tribal statutory limitation, and are

(S.Ct. of Miss. Band of Choctaw Indians 2008) (“It strains credibility to somehow assert that the licensee is not accountable within the legal structure of the sovereign, who granted the license in the first instance, for an alleged wrong that took place at the very premises where the licensed commercial activities took place.”)
not guided by Constitutional considerations applied in state and federal tribunals. Compare State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 412, (2003) ("Thus, while states enjoy considerable discretion in deducing when punitive damages are warranted, each award of punitive damages must, under the due process clause, comport with the principles set forth in BMW of N. Am. v. Gore (1996) 517 US 559, 134 L Ed 2d 809, 116 S Ct 1589[,] with Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("[T]ribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."). Simply put, the extent of power exercised by the tribe in the form of financial punishment imposed on the non-Indian is unlimited. Despite the Fifth Circuit's note that "the goal of promoting tribal self-government" is "embodied in numerous federal statutes[,]" Congress has never approved of an extension of civil jurisdiction that would override this Court's instruction that the regulation and jurisdiction over non-Indians should only extend as far as is necessary to control internal relations or protect self-government.\footnote{Congress has, in very limited areas and through very specific means, chosen to exercise its power to explicitly extend the reach of tribal court jurisdiction over non-members. For example, under the Violence Against Women Act, some tribal courts are now authorized to exercise criminal jurisdiction over some non-member defendants. See 25 U.S.C. § 1304 (conferring special domestic violence jurisdiction over non-Indians). In authorizing such jurisdiction, however, Congress also set forth detailed due-process protections, such as requiring that criminal (Continued on following page)}
Court should uphold the limitations in *Montana* and reject the use of such unlimited power to punish assumed by the tribe in this case.

Business needs certainty to flourish. "Where justice is uncertain, delayed, or denied entirely, it is completely predictable that economic stability will be difficult to obtain or maintain." *Cavanaugh,* 680 F. Supp. 2d at 1072. "The plain truth is that business owners will not locate businesses in places where the communities lack general order or where predictability of results in contractual or civil suits does not exist." *Id.* at 1072-73. For banks, the need for stability and predictability is especially important. Risk and uncertainty to banks really means risk and uncertainty to the depositors who have entrusted their money to the banks' safekeeping. If banks fear that making a loan or otherwise conducting business on a reservation may subject the depositors' money to great risk, or that the degree of risk is too difficult to calculate, those banks are less likely to extend credit and engage in business on reservations.

---

Laws and rules be made publicly available, ensuring the assistance of counsel, and requiring a "cross section of the community" jury. *Id.* Notably, even where Congress extended this criminal jurisdiction, it refrained from extending civil jurisdiction in related, and perhaps necessary areas. For example, although VAWA requires a "cross section" jury, it grants tribal courts no civil authority over non-Indians to hold non-Indian community members in contempt for failure to appear for tribal jury duty.
The need for more trade with, and economic activity on, Indian reservations cannot be understated. Since the decision in *Plains Commerce*, the economic conditions for reservation Indians, especially those in South Dakota, continue to be grim. As reflected by reports on the 2010 Census, reservation communities continue to top the list of those in deepest poverty:

Of the five counties with poverty rates greater than 39 percent, four contain or are contained within American Indian reservations: Sioux County, N.D., which is contained within the Standing Rock Indian Reservation; Buffalo County, S.D., which contains the Crow Creek Indian Reservation; Shannon County, S.D., which is contained within the Pine Ridge Indian Reservation; and Todd County, S.D., which is contained within the Rosebud Indian Reservation.

U.S. Census Bureau, New Estimates Provide Detailed Look at Every Community in the United States, available at https://www.census.gov/newsroom/releases/archives/american_community_survey_acs/cb10-cn90.html. “[A]t recent rates of economic growth it would take decades for per capita income in Indian Country to converge with that in the rest of the US[.]” Indian Country does not need greater barriers

---

to investment by, and trade with, off-reservation businesses.

The SDBA respectfully submits that greater certainty as to the limits of tribal jurisdiction, including limitations on tribal courts’ ability to impose punitive damages on non-Indians, will encourage investment and economic activity on reservation communities. The greater uncertainty and increased risks created by the Fifth Circuit’s misapplication of Montana will have detrimental effect on that economic potential. It is imperative that this Court ask if a tribal court wielding the powerful tool of unlimited punitive damages against a non-Indian defendant is “necessary” under Montana to control internal relations of the tribe under circumstances such as those presented in this case. The SDBA asserts that the exercise of such jurisdiction is not necessary or appropriate under Montana, and that upholding the decision below will have significant economic consequences for reservation economies across the United States.
CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

Brett Koenecke
Counsel of Record
A.J. Franken
May, Adam, Gerdes & Thompson LLP
503 S. Pierre Street
P.O. Box 160
Pierre, SD 57501
(605) 224-8803
brett@mayadam.net
SUBCHAPTER V—PROTECTION OF INDIANS AND CONSERVATION OF RESOURCES

§461. Allotment of land on Indian reservations

On and after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

(June 18, 1934, ch. 576, §1, 48 Stat. 984.)

SHORT TITLE OF 2004 AMENDMENT


SHORT TITLE

Act June 18, 1934, which enacted this section and sections 462, 463, 464, 465, 466 to 470, 471, 472, 473, 474, 475, 476 to 478, and 479 of this title, is popularly known as the “Indian Reorganization Act”.

§462. Existing periods of trust and restrictions on alienation extended

The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress.

(June 18, 1934, ch. 576, §2, 48 Stat. 984.)

§462a. Omitted

CODIFICATION

Section, act Apr. 11, 1940, ch. 80, 54 Stat. 106, related to reimposition and extension of trust period on lands of Crow Reservation.

§463. Restoration of lands to tribal ownership

(a) Protection of existing rights

The Secretary of the Interior, if he shall find it to be in the public interest, is authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: Provided, however, That valid rights or claims of any persons to any lands so withdrawn existing on the date of the
withdrawal shall not be affected by this Act: Provided further, That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation.

(b) Papago Indians; permits for easements, etc.


(3) Water reservoirs, charcos, water holes, springs, wells, or any other form of water development by the United States or the Papago Indians shall not be used for mining purposes under the terms of this Act, except under permit from the Secretary of the Interior approved by the Papago Indian Council: Provided, That nothing herein shall be construed as interfering with or affecting the validity of the water rights of the Indians of this reservation: Provided further, That the appropriation of living water heretofore or hereafter affected, by the Papago Indians is recognized and validated subject to all the laws applicable thereto.

(4) Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes.


REFERENCES IN TEXT

“Heretofore”, referred to in subsec. (a), means before June 18, 1934.
The public-land laws of the United States, referred to in subsec. (a), are classified generally to Title 43, Public Lands.
This Act, referred to in subsecs. (a) and (b)(3), is act June 18, 1934, which is classified generally to this subchapter. For complete classification of this Act to the Code, see Short Title note set out under section 461 of this title and Tables.

AMENDMENTS

1955—Subsec. (b)(1). Act May 27, 1955, repealed par. (1) which restored lands of Papago Indian Reservation to exploration and location.
Subsec. (b)(2). Act May 27, 1955, repealed par. (2) which required person desiring a mineral patent to pay $1 per acre in lieu of annual rental.

Subsec. (b)(1). Act Aug. 28, 1937, designated existing provisions of first par. as par. (1), substituted “damages shall be paid to the superintendent or other officer in charge of the reservation for the credit of the owner thereof” for “damages shall be paid to the Papago Tribe” and “to be the fair and reasonable value of such improvement” for “but not to exceed the cost of said improvements” and struck out “and payments derived from damages or rentals shall be deposited in the Treasury of the United States to the credit of the Papago Tribe” after “mining operations,”.
Subsec. (b)(2). Act Aug. 28, 1937, designated existing provisions of first par. as par. (2), inserted “pay to the superintendent or other officer in charge of the reservation, for” before “deposit”, substituted “Provided, That an applicant for patent shall also pay to the Secretary or other officer in charge of the said reservation for the credit of the owner” for “Provided further, That patentee shall also pay into the Treasury of the United States to the credit of the Papago Tribe” substituted “but the sum thus deposited, except for a deduction of rental at the annual rate hereinbefore provided, shall be refunded to the applicant in the event that patent is not acquired” for “the payment of $1.00 per acre for surface use to be refunded to patentee in the event that patent is not acquired” after “determination by the Secretary of the Interior, but not to exceed the cost thereof”.

**TRANSFER OF FUNCTIONS**

Functions of all other officers of Department of the Interior and functions of all agencies and employees of Department, with two exceptions, transferred to Secretary of the Interior, with power vested in him to authorize their performance or performance of any of his functions by any of those officers, agencies, and employees, by Reorg. Plan No. 3 of 1950, §§1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, set out in the Appendix to Title 5, Government Organization and Employees.

**RESTORATION OF VACANT AND UNDISPOSED-OF CEDED LANDS IN CERTAIN INDIAN RESERVATIONS**

Pub. L. 85–420, May 19, 1958, 72 Stat. 121, provided: “That all lands now or hereafter classified as vacant and undisposed-of ceded lands (including townsite lots) on the following named Indian reservations are hereby restored to tribal ownership, subject to valid existing rights:

<table>
<thead>
<tr>
<th>Reservation and State</th>
<th>Approximate acreage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Klamath River, California</td>
<td>159.57</td>
</tr>
<tr>
<td>Coeur d’Alene, Idaho</td>
<td>12,877.65</td>
</tr>
<tr>
<td>Crow, Montana</td>
<td>10,260.95</td>
</tr>
<tr>
<td>Fort Peck, Montana</td>
<td>41,450.13</td>
</tr>
<tr>
<td>Spokane, Washington</td>
<td>5,451.00</td>
</tr>
</tbody>
</table>

*Provided* That such restoration shall not apply to any lands while they are within reclamation projects heretofore authorized.

“Sec. 2. Title to the lands restored to tribal ownership by this Act shall be held by the United States in trust for the respective tribe or tribes, and such lands are hereby added to and made a part of the existing reservations for such tribe or tribes.

“Sec. 3. The lands restored to tribal ownership by this Act may be sold or exchanged by the tribe, with the approval of the Secretary of the Interior.”

**PAPAGO INDIAN RESERVATION**

Section 1 of act May 27, 1955, provided: “That the provisions with respect to subjection of mineral lands within the Papago Indian Reservation to exploration, location, and entry under the mining laws of the United States in the Executive order dated February 1, 1917, creating the Papago Indian Reservation, and in the third proviso in section 1 of the Act of February 21, 1931 (46 Stat. 1202), and the provisions of subsection (b)(1) and (2) and of the remainder, following the word ‘purposes’, of subsection (b)(4) of section 3 of the Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461–479), as amended by the Act of August 28, 1937 (50 Stat. 862, 863; 25 U.S.C. 463) [this section], are hereby repealed, all tribal lands within the Papago Indian Reservation are hereby withdrawn from all forms of exploration, location, and entry under such laws, the minerals underlying such lands are hereby made a part of the reservation to be held in trust by the United States for the Papago Indian Tribe, and such minerals shall be subject to lease for mining purposes pursuant to the provisions of the Act of May 11, 1938 (52 Stat. 347) [sections 396a to 396g of this title]: *Provided*, That the provisions of this Act shall not be applicable to lands within the Papago Indian Reservation for which a mineral patent has heretofore been issued or to a claim that has been validly initiated before the date of this Act and thereafter maintained under the mining laws of the United States.”

§463a. Extension of boundaries of Papago Indian Reservation

Whenever all privately owned lands except mining claims within the following-described area have been purchased and acquired as authorized in sections 463b and 463c of this title, the
boundary of the Papago Indian Reservation in Arizona shall be extended to include the west half of section 4; west half of section 9, township 17 south, range 8 east; all of township 18 south, range 2 west, all of fractional township 19 south, range 2 west; and all of fractional townships 18 and 19 south, range 3 west, except sections 6, 7, 18, 19, 30, and 31 in township 18 south, range 3 west, Gila and Salt River meridian. This extension shall not affect any valid rights initiated prior to July 28, 1937, nor the reservation of a strip of land sixty feet wide along the United States-Mexico boundary made by proclamation of the President dated May 27, 1907 (35 Stat. 2136). The lands herein described when added to the Papago Indian Reservation as provided in sections 463a to 463c of this title shall become a part of said reservation in all respects and upon all the same terms as if said lands had been included in the Executive order issued by the President on February 1, 1917: Provided, That lands acquired under sections 463a to 463c of this title shall remain tribal lands and shall not be subject to allotment to individual Indians.

(July 28, 1937, ch. 527, §1, 50 Stat. 536.)

§463b. Purchase of private lands; limitations

The Secretary of the Interior is authorized to purchase for the use and benefit of the Papago Indians with any available funds heretofore or hereafter appropriated, pursuant to authority contained in section 465 of this title, all privately owned lands, water rights, and reservoir site reserves within townships 18 and 19 south, ranges 2 and 3 west, together with all grazing privileges and including improvements upon public lands appurtenant to the so-called Menager Dam property, at the appraised value of $40,016.37.

(July 28, 1937, ch. 527, §2, 50 Stat. 536.)

§463c. Gift of lands by Arizona

The State of Arizona may relinquish in favor of the Papago Indians such tracts within the townships referred to in section 463a of this title as it may see fit and shall have the right to select other unreserved and nonmineral public lands within the State of Arizona equal in area to those relinquished, said lieu selections to be made in the same manner as is provided for in the Enabling Act of June 20, 1910 (36 Stat. 558), or in the discretion of the State of Arizona under the provisions of section 315g of title 43. The payment of fees or commissions is waived in all lieu selections made pursuant to this section.

(July 28, 1937, ch. 527, §3, 50 Stat. 536.)

REFERENCES IN TEXT

The Enabling Act of June 20, 1910, referred to in text, probably means act June 20, 1910, ch. 310, 36 Stat. 557, which provided that, subject to certain limitations, lieu selections of land in Arizona are to be made pursuant to sections 851 and 852 of Title 43, Public Lands.

Section 315g of title 43, referred to in text, was repealed by Pub. L. 94–579, title VII, §705(a), Oct. 21, 1976, 90 Stat. 2792.

§463d. Restoration of lands in Umatilla Indian Reservation to tribal ownership

The Secretary of the Interior is authorized in his discretion to restore to tribal ownership the undisposed of surplus lands of the Umatilla Indian Reservation, Oregon, heretofore opened to entry or other form of disposal under the public-land laws: Provided, That restoration shall be subject to any existing valid rights.

(Aug. 10, 1939, ch. 662, §1, 53 Stat. 1351.)
INHERITANCE OF TRUST OR RESTRICTED LANDS

Pub. L. 95–264, Apr. 18, 1978, 92 Stat. 202, provided: “That the right to inherit trust or restricted land on the Umatilla Indian Reservation, to the extent that the laws of descent of the State of Oregon are inconsistent herewith, shall be as provided herein.

“Sec. 2. When any Indian dies leaving any interest in trust or restricted land within the Umatilla Reservation and not having lawfully devised the same, such interest shall descend in equal shares to his or her children and to the issue of any deceased child by right of representation; and if there is no child of the decedent living at the time of his or her death, such interests shall descend to his or her other lineal descendants; and if such descendants are in the same degree of kindred to the intestate, they shall take such real property equally, or otherwise they shall take according to the right of representation. An interest taken hereunder shall be subject to the right of a surviving spouse as provided in section 3.

“Sec. 3. The surviving spouse of any Indian who dies leaving any interest in trust or restricted land within the Umatilla Reservation shall be entitled to obtain a one-half interest in all such trust or restricted interests in land during his or her lifetime.

“Sec. 4. If any Indian, who leaves any interest in trust or restricted land within the Umatilla Reservation, makes provisions for his or her surviving spouse by an approved will, such surviving spouse shall have an election whether to take the provisions as made in such will or to take the interest as set forth in section 3 of this Act, but such surviving spouse shall not be entitled to both unless it plainly appears by the will to have been so intended by the testator. When any surviving spouse is entitled to an election under this section, he or she shall be deemed to have elected to take the provisions as made in such will unless, at or prior to the first hearing to probate the will, he or she has elected to take under section 3 of this Act and not under the will.

“Sec. 5. The provisions of this Act shall apply to all estates of decedents who die on or after the date of enactment of this Act [Apr. 18, 1978].”

CONVEYANCE OF LANDS TO STIMULATE INDUSTRIAL DEVELOPMENT

Pub. L. 85–186, Aug. 28, 1957, 71 Stat. 468, provided: “That, upon request of any Indian tribe, group, or corporate entity, and approval of the request by the Secretary of the Interior as provided in this Act, the Administrator of the General Services Administration is authorized to transfer, without cost to such Indian tribe, group, or corporate entity, title to any property of the United States at the McNary Dam townsite, Umatilla, Oregon, or at Pickstown, South Dakota, that is declared surplus pursuant to the Federal Property and Administrative Services Act of 1949 (Act of June 30, 1949; 63 Stat. 378), as amended [see chapters 1 to 11 of Title 40, Public Buildings, Property, and Works, and division C (except sections 3302, 3307(e), 3501(b), 3509, 3906, 4710, and 4711) of subtitle I of Title 41, Public Contracts]. Such property shall not be exempt from taxation because of the fact that title is held by the Indian tribe, group, or corporate entity.

“Sec. 2. The Secretary of the Interior shall approve a request for surplus property pursuant to this Act only if—

“(a) the Indian tribe, group, or corporate entity is organized under State or Federal law in a form satisfactory to the Secretary for the purpose of holding title to the property;

“(b) the surplus property is to be used to stimulate industrial development near the Indian tribe, band, group, or reservations;

“(c) the Indian tribe, group, or corporate entity has executed a contract with an industrial enterprise that is acceptable to the Secretary;

“(d) the contract between the Indian tribe, group, or corporate entity and the industrial enterprise contains such provisions as the Secretary deems desirable, including in substance the following:

“(1) Title to the property will remain in the Indian tribe, group, or corporate entity, and the property will be made available to the industrial enterprise at a rental fee commensurate with the purposes of this Act, which rental shall be paid to the United States Treasury.
“(2) The industrial enterprise will employ Indians in large enough numbers to justify, in the judgment of the Secretary, the purposes of this Act.
“(3) The industrial enterprise will agree to pay its employees fair and equitable wages commensurate with the general wage scale in the area.
“(4) The industrial enterprise will maintain the property in good repair, pay all taxes properly assessed against the property, and be responsible for the payment of all charges for utility services to the property.
“(5) At the end of the contract period the industry will have an option to purchase the property at its appraised price, as determined by the Secretary, the proceeds of such sale will revert to the United States Treasury.

“Sec. 3. Any transfer of title to surplus property pursuant to this Act shall provide for a reversion of title to the United States if the Secretary of the Interior finds that the property is not being used in accordance with the provisions of the Act.
“Sec. 4. The United States shall not be responsible for providing to the Indians who are employed in an industrial development pursuant to this Act community services that are normally furnished by State and local governments, such as school, health, welfare, and law-enforcement services.
“Sec. 5. The transfer of McNary Dam townsites shall be upon the express condition that persons or families occupying residential property on the date of the enactment of this Act [Aug. 28, 1957] shall be entitled to at least one hundred and eighty days’ notice of termination of their occupancy.”

§463e. Exchanges of land
For the purpose of effecting land consolidations between Indians and non-Indians within the reservation, the Secretary of the Interior is authorized, under such rules and regulations as he may prescribe, to acquire through purchase, exchange, or relinquishment, any interest in lands, water rights, or surface rights to lands within said reservation. Exchanges of lands hereunder shall be made on the basis of equal value and the value of improvements on lands to be relinquished to the Indians or by Indians to non-Indians shall be given due consideration and allowance made therefor in the valuation of lieu lands. This section shall apply to tribal, trust, or otherwise restricted Indian allotments whether the allottee be living or deceased.


§463f. Title to lands
Title to lands or any interest therein acquired pursuant to sections 463d to 463g of this title for Indian use shall be taken in the name of the United States of America in trust for the tribe or individual Indian for which acquired.

(Aug. 10, 1939, ch. 662, §3, 53 Stat. 1351.)

§463g. Use of funds appropriated under section 465
For the purpose of carrying into effect the land-purchase provision of sections 463d to 463g of this title, the Secretary of the Interior is authorized to use so much as may be necessary of any funds heretofore or hereafter appropriated pursuant to section 465 of this title.

(Aug. 10, 1939, ch. 662, §4, 53 Stat. 1351.)

§464. Transfer and exchange of restricted Indian lands and shares of Indian tribes and corporations
Except as provided in this Act, no sale, devise, gift, exchange, or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized under this Act shall be made or approved: Provided, That such lands or interests may, with the approval of the
Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived, or to a successor corporation: Provided further, That, subject to section 8(b) of the American Indian Probate Reform Act of 2004 (Public Law 108–374; 25 U.S.C. 2201 note), lands and shares described in the preceding proviso shall descend or be devised to any member of an Indian tribe or corporation described in that proviso or to an heir or lineal descendant of such a member in accordance with the Indian Land Consolidation Act (25 U.S.C. 2201 et seq.), including a tribal probate code approved, or regulations promulgated under, that Act: Provided further, That the Secretary of the Interior may authorize any voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in the judgment of the Secretary, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.


REFERENCES IN TEXT

This Act, referred to in text, is act June 18, 1934, which is classified generally to this subchapter. For complete classification of this Act to the Code, see Short Title note set out under section 461 of this title and Tables.

The Indian Land Consolidation Act, referred to in text, is title II of Pub. L. 97–459, Jan. 12, 1983, 96 Stat. 2517, which is classified generally to chapter 24 (§2201 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2201 of this title and Tables.

AMENDMENTS


2005—Pub. L. 109–157 amended section catchline and text generally. Prior to amendment, text related to transfer of restricted Indian lands or shares in assets of Indian tribes or corporation and exchange of lands.

2004—Pub. L. 108–374, §6(d)(1), (2), in first proviso, struck out “, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located,” after “descend or be devised” and “, except as provided by the Indian Land Consolidation Act, any other Indian person for whom the Secretary of the Interior determines that the United States may hold land in trust:” after “lineal descendants of such member or”.

Pub. L. 108–374, §6(d)(3), which directed insertion of “in accordance with the Indian Land Consolidation Act (25 U.S.C. 2201 et seq.) (including a tribal probate code approved under that Act or regulations promulgated under that Act):” in first proviso without specifying where the insertion was to be made, was executed by making the insertion at end of first proviso, to reflect the probable intent of Congress.

2000—Pub. L. 106–462, which directed the amendment of this section by substituting “member or, except as provided by the Indian Land Consolidation Act,” for “member or:”, was executed by making the substitution for “member or” before “any other Indian person” to reflect the probable intent of Congress because the phrase “member or:” did not appear in text.

1980—Pub. L. 96–363, which directed the amendment of the first proviso of this section by substituting “or any heirs or lineal descendants of such member or any other Indian person for whom the Secretary of the Interior determines that the United States may hold land in trust” for “or any heirs of such
members”, was executed by making the substitution for “or any heirs of such member” to reflect the probable intent of Congress.

**Effective Date of 2006 Amendment**

Amendment by Pub. L. 109–221 effective as if included in the enactment of Pub. L. 108–374, see section 501(c) of Pub. L. 109–221, set out as a note under section 348 of this title.

**Effective Date of 2005 Amendment**


**Effective Date of 2004 Amendment**

Amendment by Pub. L. 108–374 applicable on and after the date that is 1 year after June 20, 2005, see section 8(b) of Pub. L. 108–374, set out as a Notice; Effective Date of 2004 Amendment note under section 2201 of this title.

§465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

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

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: Provided, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) 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.


**References in Text**

This Act, referred to in text, is act June 18, 1934, which is classified generally to this subchapter. For complete classification of this Act to the Code, see Short Title note set out under section 461 of this title and Tables.

Act of July 28, 1955, referred to in text, is act July 28, 1955, ch. 423, 69 Stat. 392, as amended, which is classified to sections 608 to 608c of this title. For complete classification of this Act to the Code, see Tables.

**Amendments**
PAYSON BAND, YAVAPAI-APACHE INDIAN RESERVATION

Pub. L. 92–470, Oct. 6, 1972, 86 Stat. 783, provided: “That (a) a suitable site (of not to exceed eighty-five acres) for a village for the Payson Community of Yavapai-Apache Indians shall be selected in the Tonto National Forest within Gila County, Arizona, by the leaders of the community, subject to approval by the Secretary of the Interior and the Secretary of Agriculture. The site so selected is hereby declared to be held by the United States in trust as an Indian reservation for the use and benefit of the Payson Community of Yavapai-Apache Indians.

“(b) The Payson Community of Yavapai-Apache Indians shall be recognized as a tribe of Indians within the purview of the Act of June 18, 1934, as amended (25 U.S.C. 461–479, relating to the protection of Indians and conservation of resources), and shall be subject to all of the provisions thereof.”

ROCKY BOY'S INDIAN RESERVATION

Pub. L. 85–773, Aug. 27, 1958, 72 Stat. 931, provided: “That the land acquired by the United States pursuant to section 5 of the Act of June 18, 1934 (48 Stat. 984) [this section], title to which was conveyed to the United States of America in trust for the Chippewa, Cree, and other Indians of Montana, and thereafter added to the Rocky Boy's Indian Reservation, Montana, by proclamation signed by the Assistant Secretary of the Interior on November 26, 1947, is hereby designated for the exclusive use of the members of the Chippewa Cree Tribe of the Rocky Boy's Reservation, Montana.”

SEMINOLE INDIAN RESERVATION

Act July 20, 1956, ch. 645, 70 Stat. 581, provided: “That the equitable title to the lands and interests in lands together with the improvements thereon, acquired by the United States under authority of title II of the National Industrial Recovery Act, approved June 16, 1933 (48 Stat. 200), the Emergency Relief Appropriation Act of 1935, approved April 8, 1935 (49 Stat. 115), and section 55 of the Act entitled ‘An Act to amend the Agricultural Adjustment Act, and for other purposes’, approved August 24, 1935 (49 Stat. 750, 781), administrative jurisdiction over which was transferred from the Secretary of Agriculture to the Secretary of the Interior by Executive Order Numbered 7868, dated April 15, 1938, for the use of the Seminole Tribe, is hereby conveyed to the Seminole Tribe of Indians in the State of Florida, and such lands and interests are hereby declared to be held by the United States in trust for the Seminole Tribe of Indians in the State of Florida in the same manner and to the same extent as other land held in trust for such tribe.

“Sec. 2. The lands declared to be held in trust for the Seminole Tribe of Indians in the State of Florida under the first section of this Act and all lands which have been acquired by the United States for the Seminole Tribe of Indians in the State of Florida under authority of the Act entitled ‘An Act to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes’ approved June 18, 1934 (48 Stat. 984) [sections 461, 462, 463, 464, 465, 466 to 470, 471, 472, 473, 474, 475, 476 to 478 and 479 of this title], are hereby declared to be a reservation for the use and benefit of such Seminole Tribe in Florida.

“Sec. 3. Nothing in this Act shall deprive any Indian of any individual right, ownership, right of possession, or contract right he may have in any land or interest in land referred to in this Act.”

§465a. Receipt and purchase in trust by United States of land for Klamath Tribe Indians

The Secretary of the Interior is authorized to receive on behalf of the United States from individual members of the Klamath Tribe of Indians voluntarily executed deeds to such lands as said Indians may own in fee simple free from all encumbrances, said lands to be held in trust by the United States for said Indians and their heirs; and, whenever restricted funds are used for the
purchase of lands for individual members of the Klamath Tribe of Indians, the Secretary of the Interior is authorized, in his discretion, to take title to said lands in the United States, the same to be held in trust for said individual Indians: Provided, however, That while any of the foregoing lands are held in trust by the United States for said Indians, the same shall be subject to the same restrictions, immunities, and exemptions as homesteads purchased out of trust or restricted funds of individual Indians pursuant to section 412a of this title, except the restrictions, immunities, or exemptions of the second proviso of said section.

(Feb. 24, 1942, ch. 113, §1, 56 Stat. 121.)

§465b. “Klamath Tribe of Indians” defined

As used in this section and section 465a of this title the term “Klamath Tribe of Indians” includes the Klamath and Modoc Tribes, and the Yahooskin Band of Snake Indians.

(Feb. 24, 1942, ch. 113, §2, 56 Stat. 121.)

§466. Indian forestry units; rules and regulations

The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

(June 18, 1934, ch. 576, §6, 48 Stat. 986.)

§467. New Indian reservations

The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: Provided, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

(June 18, 1934, ch. 576, §7, 48 Stat. 986.)

REFERENCES IN TEXT

This Act, referred to in text, is act June 18, 1934, which is classified generally to this subchapter. For complete classification of this Act to the Code, see Short Title note set out under section 461 of this title and Tables.

§468. Allotments or holdings outside of reservations

Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter.

(June 18, 1934, ch. 576, §8, 48 Stat. 986.)

REFERENCES IN TEXT

This Act, referred to in text, is act June 18, 1934, which is classified generally to this subchapter. For complete classification of this Act to the Code, see Short Title note set out under section 461 of this title and Tables.
§469. Indian corporations; appropriation for organizing

There is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sums as may be necessary, but not to exceed $250,000 in any fiscal year, to be expended at the order of the Secretary of the Interior, in defraying the expenses of organizing Indian chartered corporations or other organizations created under this Act.

(June 18, 1934, ch. 576, §9, 48 Stat. 986.)

REFERENCES IN TEXT

This Act, referred to in text, is act June 18, 1934, which is classified generally to this subchapter. For complete classification of this Act to the Code, see Short Title note set out under section 461 of this title and Tables.

§470. Revolving fund; appropriation for loans

There is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $20,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans.

Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established.


AMENDMENTS

1961—Pub. L. 87–250 substituted “$20,000,000” for “$10,000,000”.

1960—Pub. L. 86–533 repealed provisions which required a report to be made annually to the Congress of transactions under the authorization.

REVOLVING FUND: INTEREST-FREE LOANS TO KLAMATH INDIANS; REFINANCING LENDING AGENCY LOANS

Use of Revolving Loan Fund for Indians to assist Klamath Indians during period for terminating Federal supervision, see note set out under section 564 of this title. Funds to be administered as a single Indian Revolving Loan Fund after Apr. 12, 1974, see section 1461 of this title.

§470a. Interest charges covered into revolving fund

Interest or other charges heretofore or hereafter collected on loans shall be credited to the revolving fund created by section 470 of this title and shall be available for the establishment of a revolving fund for the purpose of making and administering loans to Indian-chartered corporations in accordance with the Act of June 18, 1934 (48 Stat. 986) [25 U.S.C. 461 et seq.], and of making and administering loans to individual Indians and to associations or corporate groups of Indians of Oklahoma in accordance with the Act of June 26, 1936 (49 Stat. 1967) [25 U.S.C. 501 et seq.].

(June 28, 1941, ch. 259, §1, 55 Stat. 316.)

REFERENCES IN TEXT

Act of June 18, 1934, referred to in text, popularly known as the Indian Reorganization Act, is classified generally to this subchapter. For complete classification of this Act to the Code, see Short Title note set out under section 461 of this title and Tables.
Act of June 26, 1936, referred to in text, popularly known as the Oklahoma Welfare Act, is classified generally to subchapter VIII (§501 et seq.) of this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 501 of this title and Tables.

§471. Vocational and trade schools; appropriation for tuition

There is authorized to be appropriated, out of any funds in the United States Treasury not otherwise appropriated, a sum not to exceed $250,000 annually, together with any unexpended balances of previous appropriations made pursuant to this section, for loans to Indians for the payment of tuition and other expenses in recognized vocational and trade schools: Provided, That not more than $50,000 of such sum shall be available for loans to Indian students in high schools and colleges. Such loans shall be reimbursable under rules established by the Commissioner of Indian Affairs.

(June 18, 1934, ch. 576, §11, 48 Stat. 986.)

TRANSFER OF FUNCTIONS

For transfer of functions of other officers, employees, and agencies of Department of the Interior, with certain exceptions, to Secretary of the Interior, with power to delegate, see Reorg. Plan No. 3 of 1950, §§1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, set out in the Appendix to Title 5, Government Organization and Employees.

§472. Standards for Indians appointed to Indian Office

The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.

(June 18, 1934, ch. 576, §12, 48 Stat. 986.)

TRANSFER OF FUNCTIONS

For transfer of functions of other officers, employees, and agencies of Department of the Interior, with certain exceptions, to Secretary of the Interior, with power to delegate, see Reorg. Plan No. 3 of 1950, §§1, 2, eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, set out in the Appendix to Title 5, Government Organization and Employees.

CONVERSION TO CAREER APPOINTMENT

Status of Indian appointed to Federal service under excepted appointment to be converted to career appointment in competitive service after three years of continuous service and satisfactory performance, see section 450i(m) of this title.

§472a. Indian preference laws applicable to Bureau of Indian Affairs and Indian Health Service positions

(a) Establishment of retention categories for purposes of reduction-in-force procedures

For purposes of applying reduction-in-force procedures under subsection (a) of section 3502 of title 5 with respect to positions within the Bureau of Indian Affairs and the Indian Health Service, the competitive and excepted service retention registers shall be combined, and any employee entitled to Indian preference who is within a retention category established under regulations prescribed under such subsection to provide due effect to military preference shall be
entitled to be retained in preference to other employees not entitled to Indian preference who are within such retention category.

(b) Reassignment of employees other than to positions in higher grades; authority to make determinations respecting

(1) The Indian preference laws shall not apply in the case of any reassignment within the Bureau of Indian Affairs or within the Indian Health Service (other than to a position in a higher grade) of an employee not entitled to Indian preference if it is determined that under the circumstances such reassignment is necessary—
   (A) to assure the health or safety of the employee or of any member of the employee's household;
   (B) in the course of a reduction in force; or
   (C) because the employee's working relationship with a tribe has so deteriorated that the employee cannot provide effective service for such tribe or the Federal Government.

(2) The authority to make any determination under subparagraph (A), (B), or (C) of paragraph (1) is vested in the Secretary of the Interior with respect to the Bureau of Indian Affairs and the Secretary of Health and Human Services with respect to the Indian Health Service, and, notwithstanding any other provision of law, the Secretary involved may not delegate such authority to any individual other than a Deputy Secretary or Assistant Secretary of the respective department.

c) Waiver of applicability in personnel actions; scope, procedures, etc.

(1) Notwithstanding any provision of the Indian preference laws, such laws shall not apply in the case of any personnel action respecting an applicant or employee not entitled to Indian preference if each tribal organization concerned grants, in writing, a waiver of the application of such laws with respect to such personnel action.

(2) The provisions of section 8336(j) of title 5 shall not apply to any individual who has accepted a waiver with respect to a personnel action pursuant to paragraph (1) of this subsection or to section 2011(f) of this title.

d) Placement of non-Indian employees in other Federal positions; assistance of Office of Personnel Management; cooperation of other Federal agencies

The Office of Personnel Management shall provide all appropriate assistance to the Bureau of Indian Affairs and the Indian Health Service in placing non-Indian employees of such agencies in other Federal positions. All other Federal agencies shall cooperate to the fullest extent possible in such placement efforts.

e) Definitions

For purposes of this section—

(1) The term “tribal organization” means—
   (A) the recognized governing body of any Indian tribe, band, nation, pueblo, or other organized community, including a Native village (as defined in section 1602(c) of title 43); or
   (B) in connection with any personnel action referred to in subsection (c)(1) of this section, any legally established organization of Indians which is controlled, sanctioned, or chartered by a governing body referred to in subparagraph (A) of this
paragraph and which has been delegated by such governing body the authority to grant a waiver under such subsection with respect to such personnel action.

(2) The term “Indian preference laws” means section 472 of this title or any other provision of law granting a preference to Indians in promotions and other personnel actions.

(3) The term “Bureau of Indian Affairs” means (A) the Bureau of Indian Affairs and (B) all other organizational units in the Department of the Interior directly and primarily related to providing services to Indians and in which positions are filled in accordance with the Indian preference laws.


REFERENCES IN TEXT


AMENDMENTS

1998—Subsec. (d). Pub. L. 105–362, §801(e)(3), struck out par. (1) designation and struck out par. (2) which read as follows: “The Secretaries of the Interior and Health and Human Services, and the Director of the Office of Personnel Management shall each submit a report to Congress following the close of each fiscal year with respect to the actions which they took in such fiscal year to place non-Indian employees of the Bureau of Indian Affairs and the Indian Health Service in other Federal positions.”

Pub. L. 105–362, §801(e)(1), (2), redesignated subsec. (e) as (d) and struck out former subsec. (d) which read as follows: “The Secretaries of the Interior and Health and Human Services shall each submit to the Congress a report following the close of each fiscal year with respect to the actions which they took in such fiscal year to recruit and train Indians to qualify such Indians for positions which are subject to preference under the Indian preference laws. Such report shall also include information as to the grade levels and occupational classifications of Indian and non-Indian employees in the Bureau of Indian Affairs and the Indian Health Service.”

Subsec. (e). Pub. L. 105–362, §1302(d), which directed the amendment of subsec. (e) by striking out par. (1) designation after “(e)” and striking out par. (2), could not be executed because par. (1) designation did not immediately follow “(e)” subsequent to amendment by Pub. L. 105–362, §801(e)(2). See above.


1990—Subsec. (b)(2). Pub. L. 101–509 substituted “a Deputy Secretary” for “an Under Secretary” before “or Assistant Secretary”. 1988—Subsec. (c)(1). Pub. L. 100–581 substituted “an applicant or employee” for “an employee”.

CHANGE OF NAME

“Secretary of Health and Human Services” substituted for “Secretary of Health, Education, and Welfare” in subsec. (b)(2) pursuant to section 509(b) of Pub. L. 96–88 which is classified to section 3508(b) of Title 20, Education.
Effective Date of 1990 Amendment

Amendment by Pub. L. 101–509 effective on first day of first pay period beginning on or after Nov. 5, 1990, with continued service by incumbent Under Secretary of the Interior, see section 529 [title I, §112(e)(1), (2)(B)] of Pub. L. 101–509, set out as a note under section 3404 of Title 20, Education.

1 See References in Text note below.

§473. Application generally

The provisions of this Act shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that sections 9, 10, 11, 12, and 16 [25 U.S.C. 469, 470, 471, 472, 476] shall apply to the Territory of Alaska: Provided, That sections 4, 7, 16, 17, and 18 of this Act [25 U.S.C. 464, 467, 476, 477, 478] shall not apply to the following-named Indian tribes, the members of such Indian tribes, together with members of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomie, Cherokee, Chickasaw, Choctaw, Creek, and Seminole. Section 4 of this Act [25 U.S.C. 464] shall not apply to the Indians of the Klamath Reservation in Oregon.

(June 18, 1934, ch. 576, §13, 48 Stat. 986; Pub. L. 101–301, §3(b), May 24, 1990, 104 Stat. 207.)

References in Text

This Act, referred to in text, is act June 18, 1934, which is classified generally to this subchapter. For complete classification of this Act to the Code, see Short Title note set out under section 461 of this title and Tables.

Amendments


Admission of Alaska as State

Admission of Alaska into the Union was accomplished Jan. 3, 1959, on issuance of Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub. L. 85–508, July 7, 1958, 72 Stat. 339, set out as notes preceding section 21 of Title 48, Territories and Insular Possessions.

§473a. Application to Alaska

Sections 461, 465, 467, 468, 475, 477, and 479 of this title shall after May 1, 1936, apply to the Territory of Alaska: Provided, That groups of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 470, 476, and 477 of this title.

(May 1, 1936, ch. 254, §1, 49 Stat. 1250.)

Codification

Section was formerly classified to section 362 of Title 48, Territories and Insular Possessions.

Admission of Alaska as State

Admission of Alaska into the Union was accomplished Jan. 3, 1959, on issuance of Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. c16, as required by sections 1 and 8(c) of Pub. L. 85–508, July 7, 1958, 72 Stat. 339, set out as notes preceding section 21 of Title 48, Territories and Insular Possessions.
§474. Continuation of allowances

The Secretary of the Interior is directed to continue the allowance of the articles enumerated in section 17 of the Act of March 2, 1889 (23 Stat. L. 894), or their commuted cash value under the Act of June 10, 1896 (29 Stat. L. 334), to all Sioux Indians who would be eligible, but for the provisions of this Act, to receive allotments of lands in severalty under section 19 of the Act of May 29, 1908 (25 Stat. L. 451), or under any prior Act, and who have the prescribed status of the head of a family or single person over the age of eighteen years, and his approval shall be final and conclusive, claims therefor to be paid as formerly from the permanent appropriation made by said section 17 and carried on the books of the Treasury for this purpose. No person shall receive in his own right more than one allowance of the benefits, and application must be made and approved during the lifetime of the allottee or the right shall lapse. Such benefits shall continue to be paid upon such reservation until such time as the lands available therein for allotment on June 18, 1934, would have been exhausted by the award to each person receiving such benefits of an allotment of eighty acres of such land.

(June 18, 1934, ch. 576, §14, 48 Stat. 987.)

REFERENCES IN TEXT

Section 17 of the Act of March 2, 1889, referred to in text, probably means section 17 of act Mar. 2, 1889, ch. 405, 25 Stat. 894, which contains a proviso that each head of family or single person over the age of eighteen years of the Sioux Nation of Indians, “who shall have or may hereafter take his or her allotment of land in severalty, shall be provided with two milch cows, one pair of oxen, with yoke and chain, or two mares and one set of harness in lieu of said oxen, yoke and chain, as the Secretary of the Interior may deem advisable, and they shall also receive one plow, one wagon, one harrow, one hoe, one axe, and one pitchfork, all suitable to the work they may have to do, and also fifty dollars in cash; to be expended under the direction of the Secretary of the Interior in aiding such Indians to erect a house and other buildings suitable for residence or the improvement of his allotment; no sales, barters or bargains shall be made by any person other than said Indians with each other, of any of the personal property hereinafore provided for, and any violation of this provision shall be deemed a misdemeanor and punished by fine not exceeding one hundred dollars, or imprisonment not exceeding one year or both in the discretion of the court.”

Act of June 10, 1896, referred to in text, is act June 10, 1896, ch. 398, 29 Stat. 334, which contains a provision directing the Secretary of the Interior to ascertain the number of Sioux and Ponca Indians in South Dakota and Nebraska who would not be benefited by the fulfillment of the proviso quoted above from the act of March 2, 1889, and who desire to have the articles of personal property, therein mentioned converted into money, and in lieu of such articles of personal property, or any part thereof he may think proper, to convert or commute the same, or so much thereof as he may think proper, into money, and to pay the amount thereof to such Indians.

This Act, referred to in text, is act June 18, 1934, which is classified generally to this subchapter. For complete classification of this Act to the Code, see Short Title note set out under section 461 of this title and Tables.

Section 19 of the Act of May 29, 1908, referred to in text, probably means section 19 of act May 29, 1908, ch. 216, 35 Stat. 451, which authorizes the Secretary of the Interior to cause allotments to be made under the provisions of act Mar. 2, 1889, ch. 405, 25 Stat. 888, to any living children of the Sioux tribe of Indians belonging on any of the Great Sioux reservations affected thereby and who had not prior to May 29, 1908, been allotted, so long as the tribe to which such Indian children belong is possessed of any unallotted tribal or reservation lands. The section further provides that where, for any reason, an Indian did not receive the quantity of land to which he was entitled under the provisions of said act March 2, 1889, the Secretary of the Interior shall cause to be allotted to him sufficient additional lands on the reservation to which he belongs to make, together with the quantity of land theretofore allotted to him, the
acreage to which he is entitled under said act March 2, 1889; and in case of the death of any such Indian, the additional lands to which he is of right entitled may be allotted to his heirs: Provided, the tribe to which he belonged is possessed of any unallotted tribal or reservation lands.

**APPROPRIATIONS**

Section 2 of act June 26, 1934, ch. 756, 48 Stat. 1225, which was classified to section 725a of former Title 31, Money and Finance, repealed the permanent appropriation under the title “Civilization of the Sioux (4x950)” effective July 1, 1935, and provided that such portions of any Acts as make permanent appropriations to be expended under such account are amended so as to authorize, in lieu thereof, annual appropriations from the general fund of the Treasury in identical terms and in such amounts as now provided by the laws providing such permanent appropriations.

§475. Claims or suits of Indian tribes against United States; rights unimpaired

Nothing in this Act shall be construed to impair or prejudice any claim or suit of any Indian tribe against the United States. It is declared to be the intent of Congress that no expenditures for the benefit of Indians made out of appropriations authorized by said sections shall be considered as offsets in any suit brought to recover upon any claim of such Indians against the United States. (June 18, 1934, ch. 576, §15, 48 Stat. 987.)

**REFERENCES IN TEXT**

This Act, referred to in text, is act June 18, 1934, which is classified generally to this subchapter. For complete classification of this Act to the Code, see Short Title note set out under section 461 of this title and Tables.

§475a. Offsets of gratuities

In all suits now pending in the United States Court of Federal Claims by an Indian tribe or band which have not been tried or submitted, and in any suit hereafter filed in the United States Court of Federal Claims by any such tribe or band, the United States Court of Federal Claims is directed to consider and to offset against any amount found due the said tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe or band; and in all cases now pending or hereafter filed in the United States Court of Federal Claims in which an Indian tribe or band is party plaintiff, wherein the duty of the court is merely to report its findings of fact and conclusions to Congress, the said United States Court of Federal Claims is directed to include in its report a statement of the amount of money which has been expended by the United States gratuitously for the benefit of the said tribe or band: Provided, That expenditures made prior to the date of the law, treaty, agreement, or Executive order under which the claims arise shall not be offset against the claims or claim asserted; and expenditures under the Act of June 18, 1934 (48 Stat. L. 984) [25 U.S.C. 461 et seq.], except expenditures under appropriations made pursuant to section 5 of such Act [25 U.S.C. 465], shall not be charged as offsets against any claim on behalf of an Indian tribe or tribes now pending in the United States Court of Federal Claims or hereafter filed: Provided further, That funds appropriated and expended from tribal funds shall not be construed as gratuities; and this section shall not be deemed to amend or affect the various Acts granting jurisdiction to the United States Court of Federal Claims to hear and determine the claims listed on page 678 of the hearings before the subcommittee of the House Committee on Appropriations on the second deficiency appropriation bill for the fiscal year 1935: And provided further, That no expenditure under any emergency appropriation or allotment made subsequently to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from
distress caused by unemployment and conditions resulting therefrom, the prosecution of public works and public projects for the relief of unemployment or to increase employment, and for work relief (including the civil-works program) shall be considered in connection with the operation of this section.


REFERENCES IN TEXT

Act of June 18, 1934, referred to in text, popularly known as the Indian Reorganization Act, is classified generally to this subchapter. For complete classification of this Act to the Code, see Short Title note set out under section 461 of this title and Tables.

AMENDMENTS


EFFECTIVE DATE OF 1992 AMENDMENT


EFFECTIVE DATE OF 1982 AMENDMENT


§476. Organization of Indian tribes; constitution and bylaws and amendment thereof; special election

(a) Adoption; effective date

Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when—

1. ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and

2. approved by the Secretary pursuant to subsection (d) of this section.

(b) Revocation

Any constitution or bylaws ratified and approved by the Secretary shall be revocable by an election open to the same voters and conducted in the same manner as provided in subsection (a) of this section for the adoption of a constitution or bylaws.

(c) Election procedure; technical assistance; review of proposals; notification of contrary-to-applicable law findings

1. The Secretary shall call and hold an election as required by subsection (a) of this section—

   (A) within one hundred and eighty days after the receipt of a tribal request for an election to ratify a proposed constitution and bylaws, or to revoke such constitution and bylaws; or
(B) within ninety days after receipt of a tribal request for election to ratify an amendment to the constitution and bylaws.

(2) During the time periods established by paragraph (1), the Secretary shall—

(A) provide such technical advice and assistance as may be requested by the tribe or as the Secretary determines may be needed; and

(B) review the final draft of the constitution and bylaws, or amendments thereto to determine if any provision therein is contrary to applicable laws.

(3) After the review provided in paragraph (2) and at least thirty days prior to the calling of the election, the Secretary shall notify the tribe, in writing, whether and in what manner the Secretary has found the proposed constitution and bylaws or amendments thereto to be contrary to applicable laws.

(d) Approval or disapproval by Secretary; enforcement

(1) If an election called under subsection (a) of this section results in the adoption by the tribe of the proposed constitution and bylaws or amendments thereto, the Secretary shall approve the constitution and bylaws or amendments thereto within forty-five days after the election unless the Secretary finds that the proposed constitution and bylaws or any amendments are contrary to applicable laws.

(2) If the Secretary does not approve or disapprove the constitution and bylaws or amendments within the forty-five days, the Secretary's approval shall be considered as given. Actions to enforce the provisions of this section may be brought in the appropriate Federal district court.

(e) Vested rights and powers; advisement of presubmitted budget estimates

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments. The Secretary shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

(f) Privileges and immunities of Indian tribes; prohibition on new regulations

Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

(g) Privileges and immunities of Indian tribes; existing regulations

Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

(h) Tribal sovereignty
Notwithstanding any other provision of this Act—

(1) each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section; and

(2) nothing in this Act invalidates any constitution or other governing document adopted by an Indian tribe after June 18, 1934, in accordance with the authority described in paragraph (1).


REFERENCES IN TEXT

Act of June 18, 1934, and this Act, referred to in subsecs. (f) and (h), is act of June 18, 1934, ch. 576, 48 Stat. 984, popularly known as the Indian Reorganization Act, which is classified generally to this subchapter. For complete classification of this Act to the Code, see Short Title note set out under section 461 of this title and Tables.

CODIFICATION

May 31, 1994, referred to in subsec. (g), was in the original “the date of enactment of this Act”, which was translated as meaning the date of enactment of Pub. L. 103–263, which enacted subsec. (g) of this section, to reflect the probable intent of Congress.

AMENDMENTS


2000—Subsec. (e). Pub. L. 106–179 struck out “, the choice of counsel and fixing of fees to be subject to the approval of the Secretary” after “To employ legal counsel”.

1994—Subsecs. (f), (g). Pub. L. 103–263 added subsecs. (f) and (g).

1988—Pub. L. 100–581 amended section generally, substituting subsecs. (a) to (e) for two former undesignated pars.

DEFINITIONS APPLICABLE

Section 102 of title I of Pub. L. 100–581 provided that: “For the purpose of this Act [probably means title I of Pub. L. 100–581 which amended this section and enacted provisions set out below], the term—

“(1) ‘applicable laws’ means any treaty, Executive order or Act of Congress or any final decision of the Federal courts which are applicable to the tribe, and any other laws which are applicable to the tribe pursuant to an Act of Congress or by any final decision of the Federal courts;

“(2) ‘appropriate tribal request’ means receipt in the Area Office of the Bureau of Indian Affairs having administrative jurisdiction over the requesting tribe of a duly enacted tribal resolution requesting a Secretarial election as well as a copy of the proposed tribal constitution and bylaws, amendment, or revocation action;

“(3) ‘Secretary’ means the Secretary of the Interior.”

AMENDMENT OF TRIBAL CONSTITUTION AND BYLAWS

Section 103 of title I of Pub. L. 100–581 provided that: “Nothing in this Act [probably means title I of Pub. L. 100–581 which amended this section and enacted provisions set out above] is intended to amend, revoke, or affect any tribal constitution, bylaw, or amendment ratified and approved prior to this Act.”

§477. Incorporation of Indian tribes; charter; ratification by election

The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: Provided, That such charter shall not become operative until ratified by the
governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

(June 18, 1934, ch. 576, §17, 48 Stat. 988; Pub. L. 101–301, §3(c), May 24, 1990, 104 Stat. 207.)

AMENDMENTS

1990—Pub. L. 101–301 substituted “by any tribe” for “by at least one-third of the adult Indians”, “by the governing body of such tribe” for “at a special election by a majority vote of the adult Indians living on the reservation”, and “twenty-five years any trust or restricted lands” for “ten years any of the land”.

§478. Acceptance optional

This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after June 18, 1934, to call such an election, which election shall be held by secret ballot upon thirty days’ notice.

(June 18, 1934, ch. 576, §18, 48 Stat. 988.)

REFERENCES IN TEXT

This Act, referred to in text, is act June 18, 1934, which is classified generally to this subchapter. For complete classification of this Act to the Code, see Short Title note set out under section 461 of this title and Tables.

EXTENSIONS OF TIME

The time for holding an election under this section was extended to June 18, 1936, by act June 15, 1935, ch. 260, §2, 49 Stat. 378.

Act June 15, 1935, ch. 260, §3, 49 Stat. 378, provided that the periods of trust or the restrictions on alienation of Indian lands should be extended to Dec. 31, 1936, in case of a vote against the application of sections 461, 462, 463, 464, 465, 466 to 470, 471, 472, 473, 474, 475, 476 to 478, and 479 of this title.

§478–1. Mandatory application of sections 462 and 477

Notwithstanding section 478 of this title, sections 462 and 477 of this title shall apply to—

(1) all Indian tribes,

(2) all lands held in trust by the United States for Indians, and

(3) all lands owned by Indians that are subject to a restriction imposed by the United States on alienation of the rights of the Indians in the lands.

(Pub. L. 101–301, §3(a), May 24, 1990, 104 Stat. 207.)

§478a. Procedure

In any election heretofore or hereafter held under the Act of June 18, 1934 (48 Stat. 984) [25 U.S.C. 461 et seq.], on the question of excluding a reservation from the application of the said Act or on the question of adopting a constitution and bylaws or amendments thereto or on the question of ratifying a charter, the vote of a majority of those actually voting shall be necessary and sufficient to effectuate such exclusion, adoption, or ratification, as the case may be:
Provided, however, That in each instance the total vote cast shall not be less than 30 per centum of those entitled to vote.
(June 15, 1935, ch. 260, §1, 49 Stat. 378.)

REFERENCES IN TEXT
Act of June 18, 1934, referred to in text, popularly known as the Indian Reorganization Act, is classified generally to this subchapter. For complete classification of this Act to the Code, see Short Title note set out under section 461 of this title and Tables.

§478b. Application of laws and treaties
All laws, general and special, and all treaty provisions affecting any Indian reservation which has voted or may vote to exclude itself from the application of the Act of June 18, 1934 (48 Stat. 984) [25 U.S.C. 461 et seq.], shall be deemed to have been continuously effective as to such reservation, notwithstanding the passage of said Act of June 18, 1934. Nothing in the Act of June 18, 1934, shall be construed to abrogate or impair any rights guaranteed under any existing treaty with any Indian tribe, where such tribe voted not to exclude itself from the application of said Act.
(June 15, 1935, ch. 260, §4, 49 Stat. 378.)

REFERENCES IN TEXT
Act of June 18, 1934, referred to in text, popularly known as the Indian Reorganization Act, is classified generally to this subchapter. For complete classification of this Act to the Code, see Short Title note set out under section 461 of this title and Tables.

§479. Definitions
The term “Indian” as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term “tribe” wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words “adult Indians” wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.
(June 18, 1934, ch. 576, §19, 48 Stat. 988.)

REFERENCES IN TEXT
This Act, referred to in text, is act June 18, 1934, which is classified generally to this subchapter. For complete classification of this Act to the Code, see Short Title note set out under section 461 of this title and Tables.

ADMISSION OF ALASKA AS STATE
Admission of Alaska into the Union was accomplished Jan. 3, 1959, on issuance of Proc. No. 3269, Jan. 3, 1959, 24 F.R. 81, 73 Stat. 116, as required by sections 1 and 8(c) of Pub. L. 85–508, July 7, 1958, 72 Stat. 339, set out as notes preceding section 21 of Title 48, Territories and Insular Possessions.

§479a. Definitions
For the purposes of this title: ¶
(1) The term “Secretary” means the Secretary of the Interior.
The term “Indian tribe” means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe.

The term “list” means the list of recognized tribes published by the Secretary pursuant to section 479a–1 of this title.


REFERENCES IN TEXT

This title, referred to in introductory provisions, is title I of Pub. L. 103–454, Nov. 2, 1994, 108 Stat. 4791, which enacted this section, section 479a–1 of this title, and provisions set out as notes below. For complete classification of this title to the Code, see Short Title note below and Tables.

SHORT TITLE

Section 101 of title I of Pub. L. 103–454 provided that: “This title [enacting this section and section 479a–1 of this title and provisions set out below] may be cited as the ‘Federally Recognized Indian Tribe List Act of 1994’.”

CONGRESSIONAL FINDINGS

Section 103 of Pub. L. 103–454 provided that: “The Congress finds that—

“(1) the Constitution, as interpreted by Federal case law, invests Congress with plenary authority over Indian Affairs;

“(2) ancillary to that authority, the United States has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes;

“(3) Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated ‘Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;’ or by a decision of a United States court;

“(4) a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress;

“(5) Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated;

“(6) the Secretary of the Interior is charged with the responsibility of keeping a list of all federally recognized tribes;

“(7) the list published by the Secretary should be accurate, regularly updated, and regularly published, since it is used by the various departments and agencies of the United States to determine the eligibility of certain groups to receive services from the United States; and

“(8) the list of federally recognized tribes which the Secretary publishes should reflect all of the federally recognized Indian tribes in the United States which are eligible for the special programs and services provided by the United States to Indians because of their status as Indians.”

See References in Text note below.

§479a–1. Publication of list of recognized tribes

(a) Publication of list
The Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(b) Frequency of publication

The list shall be published within 60 days of November 2, 1994, and annually on or before every January 30 thereafter.


§480. Indians eligible for loans


(May 10, 1939, ch. 119, §1, 53 Stat. 698.)

REFERENCES IN TEXT

Act of June 18, 1934, referred to in text, popularly known as the Indian Reorganization Act, is classified generally to this subchapter. For complete classification of this Act to the Code, see Short Title note set out under section 461 of this title and Tables.

Act of June 26, 1936, referred to in text, popularly known as the Oklahoma Welfare Act, is classified generally to subchapter VIII (§501 et seq.) of this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 501 of this title and Tables.

§481. Omitted

CODIFICATION

Section, act July 2, 1942, ch. 473, §1, 56 Stat. 513, which related to an allowance to Indians traveling away from home involved in tribal organization work, was from the Interior Department Appropriation Act, 1943, and was not repeated in subsequent appropriations acts.

§482. Revolving fund; loans; regulations

The Secretary of the Interior, or his designated representative, is authorized, under such regulations as the Secretary may prescribe, to make loans from the revolving fund established pursuant to the Acts of June 18, 1934 (48 Stat. 984) [25 U.S.C. 461 et seq.], and June 26, 1936 (49 Stat. 1967) [25 U.S.C. 501 et seq.], to tribes, bands, groups, and individual Indians, not otherwise eligible for loans under said Acts: Provided, That no portion of these funds shall be loaned to Indians of less than one-quarter Indian blood.

(May 7, 1948, ch. 266, 62 Stat. 211.)

REFERENCES IN TEXT

Act of June 18, 1934, referred to in text, popularly known as the Indian Reorganization Act, is classified generally to this subchapter. Provisions of the Act establishing the revolving fund are set out in section 470 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 461 of this title and Tables.

Funds in the revolving fund authorized by these Acts, and certain other sums, to be administered after Apr. 12, 1974, as a single Indian Revolving Loan Fund, see section 1461 of this title.

§483. Sale of land by individual Indian owners

The Secretary of the Interior, or his duly authorized representative, is authorized in his discretion, and upon application of the Indian owners, to issue patents in fee, to remove restrictions against alienation, and to approve conveyances, with respect to lands or interests in lands held by individual Indians under the provisions of the Act of June 18, 1934 (48 Stat. 984) [25 U.S.C. 461 et seq.], or the Act of June 26, 1936 (49 Stat. 1967) [25 U.S.C. 501 et seq.].

(May 14, 1948, ch. 293, 62 Stat. 236.)

REFERENCES IN TEXT

Act of June 18, 1934, referred to in text, popularly known as the Indian Reorganization Act, is classified generally to this subchapter. For complete classification of this Act to the Code, see Short Title note set out under section 461 of this title and Tables.

Act of June 26, 1936, referred to in text, popularly known as the Oklahoma Welfare Act, is classified generally to subchapter VIII (§501 et seq.) of this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 501 of this title and Tables.

§483a. Mortgages and deeds of trust by individual Indian owners; removal from trust or restricted status; application to Secretary

(a) The individual Indian owners of any land which either is held by the United States in trust for them or is subject to a restriction against alienation imposed by the United States are authorized, subject to approval by the Secretary of the Interior, to execute a mortgage or deed of trust to such land. Such land shall be subject to foreclosure or sale pursuant to the terms of such mortgage or deed of trust in accordance with the laws of the tribe which has jurisdiction over such land or, in the case where no tribal foreclosure law exists, in accordance with the laws of the State or Territory in which the land is located. For the purpose of any foreclosure or sale proceeding the Indian owners shall be regarded as vested with an unrestricted fee simple title to the land, the United States shall not be a necessary party to the proceeding, and any conveyance of the land pursuant to the proceeding shall divest the United States of title to the land. All mortgages and deeds of trust to such land heretofore approved by the Secretary of the Interior are ratified and confirmed.

(b) In the event such land is acquired by an Indian or an Indian tribe, such land shall not be removed from trust or restricted status except upon application to the Secretary under existing law.


AMENDMENTS

1990—Subsec. (a). Pub. L. 101–644 inserted “tribe which has jurisdiction over such land or, in the case where no tribal foreclosure law exists, in accordance with the laws of the” before “State” in second sentence.

1984—Pub. L. 98–608 designated existing provisions as subsec. (a) and added subsec. (b).

§484. Conversion of exchange assignments of tribal lands on certain Sioux reservations into trust titles; trust and tax exemption
From and after July 14, 1954, each grant of exchange assignment of tribal lands on the Cheyenne River Sioux Reservation and the Standing Rock Sioux Reservation shall have the same force and effect, and shall confer the same rights, including all timber, mineral, and water rights now vested in or held by the Cheyenne River Sioux Tribe or the Standing Rock Sioux Tribe, upon the holder or holders thereof, that are conveyed by a trust patent issued pursuant to section 348 of this title, as supplemented, except that the period of trust and tax exemption shall continue until otherwise directed by Congress.

(July 14, 1954, ch. 472, §1, 68 Stat. 467.)

§485. Payment to assignment holders of moneys collected for use of subsurface rights

The Cheyenne River Sioux Tribe and the Standing Rock Sioux Tribe are authorized to pay to each holder of an exchange assignment of tribal lands all moneys collected by the tribe for the lease or use of subsurface rights in such lands.

(July 14, 1954, ch. 472, §2, 68 Stat. 468.)

§486. Regulations

The Secretary of the Interior is authorized to prescribe such regulations as may be necessary to carry out the provisions of sections 484 to 486 of this title.

(July 14, 1954, ch. 472, §3, 68 Stat. 468.)

§487. Spokane Indian Reservation; consolidations of land

(a) Purchase, sale, and exchange

For the purpose of effecting consolidations of land situated within the Spokane Indian Reservation in the State of Washington into the ownership of the tribe and of individual tribal members and for the purpose of attaining and preserving an economic land base for Indian use, alleviating problems of Indian heirship and assisting in the productive leasing, disposition, and other use of tribal lands, the Secretary of the Interior is authorized in his discretion to:

(1) Purchase for the Spokane Tribe of Indians with any funds of such tribe and to otherwise acquire by gift, exchange, or relinquishment any lands or interest in lands or improvements thereon within the Spokane Indian Reservation.

(2) Sell or approve sales of any tribal trust lands, any interest therein or improvements thereon.

(3) Exchange any tribal trust lands, including interests therein or improvements thereon, for any lands situated within such reservation.

(b) Individual Indian trust lands

The Secretary of the Interior is authorized to sell and exchange individual Indian trust lands held in multiple ownership to the Spokane Tribe or to individual members thereof if the sale or exchange is authorized in writing by owners of at least a majority interest in such lands; except that no greater percentage of approval of individual Indians shall be required under this Act than in any other statute of general application approved by Congress.

(c) Nontaxability

Title to lands, or any interests therein, acquired pursuant to this Act for the Spokane Tribe or individual enrolled members thereof, shall be taken in the name of the United States of America in trust for the tribe or individual Indian, and shall be nontaxable as other tribal and allotted Indian trust lands of the Spokane Reservation.
(d) Lands held by mortgage or deed of trust
That any tribal land that may be sold pursuant to this Act may, with the approval of the Secretary of the Interior, be encumbered by a mortgage or deed of trust and shall be subject to foreclosure or sale pursuant to the terms of such a mortgage or deed of trust in accordance with the laws of the State of Washington. The United States shall be an indispensable party to any such proceeding with the right of removal of the clause to the United States district court for the district in which the land is located, following the procedure in section 1446 of title 28: Provided, That the United States shall have the right to appeal from any order of remand in the case.

(e) Acquisition and sale procedures; land purchase and consolidation program
The acquisition and sale of lands for the Spokane Tribe pursuant to this Act shall be upon request of the business council of the Spokane Tribe, evidenced by a resolution adopted in accordance with the constitution and bylaws of the tribe, and shall be in accordance with a land purchase and consolidation plan approved by the Secretary of the Interior, and except as it may otherwise be authorized or prescribed by the Secretary, shall be limited to lands situated within the boundary of the Spokane Reservation. Such acquisition by the Spokane Tribe, or individual members thereof, may be achieved by exchange of lands with Indians or non-Indians as well as outright purchase, with adjusting payments to approximate equal value. Moneys or credits received by the tribe in the sale of lands shall be used for the purchase of other lands, or for such other purpose as may be consistent with the land purchase and consolidation program, approved by the Secretary of the Interior.


REFERENCES IN TEXT
This Act, referred to in subsecs. (c), (d), and (e), is Pub. L. 90–335, June 10, 1968, 82 Stat. 174, as amended, which enacted this section and amended section 415 of this title. For complete classification of this Act to the Code, see Tables.

CODIFICATION
Section is comprised of subsecs. (a) to (e) of section 1 of Pub. L. 90–335. Subsec. (f) of section 1 of Pub. L. 90–335 amended section 415 of this title.

AMENDMENTS
1974—Subsec. (c). Pub. L. 93–286 substituted “for the Spokane Tribe or individual” for “by the Spokane Tribe or individual”, and struck out proviso that the value on nontrust lands, or nontrust interests in land, acquired under this section by the Spokane Tribe during any twelve-month period shall not exceed the value of lands, or interests in land, that passed in any manner from a nontaxable trust status to a taxable fee status within the boundaries of the Spokane Reservation in Stevens County, Washington, during the twelve-month period preceding acquisition by the tribe.

§488. Loans to purchasers of highly fractioned land
(a) In general
The Secretary of Agriculture is authorized to make loans from the Farmers Home Administration Direct Loan Account created by section 1988(c) 1 of title 7, and to make and insure loans as provided in sections 1928 1 and 1929 of title 7, to any Indian tribe recognized by the Secretary of the Interior or tribal corporation established pursuant to the Indian
Reorganization Act (25 U.S.C. 477), which does not have adequate uncommitted funds, to acquire lands or interests therein within the tribe's reservation as determined by the Secretary of the Interior, or within a community in Alaska incorporated by the Secretary pursuant to the Indian Reorganization Act [25 U.S.C. 461 et seq.], for use of the tribe or the corporation or the members of either. Such loans shall be limited to such Indian tribes or tribal corporations as have reasonable prospects of success in their proposed operations and as are unable to obtain sufficient credit elsewhere at reasonable rates and terms to finance the purposes authorized in sections 488 to 494 of this title.

(b) Highly fractionated land

(1) In general

Subject to paragraph (2), the Secretary of Agriculture may make and insure loans in accordance with section 1929 of title 7 to eligible purchasers of highly fractionated land pursuant to section 2204(c) of this title.

(2) Exclusion

Section 491 of this title shall not apply to trust land, restricted tribal land, or tribal corporation land that is mortgaged in accordance with paragraph (1).


REFERENCES IN TEXT


Section 1928 of title 7, referred to in subsec. (a), was amended generally by Pub. L. 104–127, title VI, §605, Apr. 4, 1996, 110 Stat. 1086, and, as so amended, no longer contains provisions relating to insurance of loans.

Tribal corporation established by the Indian Reorganization Act (25 U.S.C. 477), referred to in subsec. (a), means a tribal corporation established under act June 18, 1934, ch. 576, §17, 48 Stat. 988, which is classified to section 477 of this title.

The Indian Reorganization Act, referred to in subsec. (a), is act June 18, 1934, ch. 576, 48 Stat. 984, which is classified generally to this subchapter. For complete classification of this Act to the Code, see Short Title note set out under section 461 of this title and Tables.

CODIFICATION


AMENDMENTS


EFFECTIVE DATE OF 2008 AMENDMENT


1 See References in Text note below.

§489. Title in trust to United States
Title to land acquired by a tribe or tribal corporation with a loan made or insured pursuant to sections 488 to 494 of this title may, with the approval of the Secretary of the Interior, be taken by the United States in trust for the tribe or tribal corporation.

(Pub. L. 91–229, §2, Apr. 11, 1970, 84 Stat. 120.)

§490. Tribal rights and privileges in connection with loans

A tribe or tribal corporation to which a loan is made or insured pursuant to sections 488 to 494 of this title (1) may waive in writing any immunity from suit or liability which it may possess, (2) may mortgage or otherwise hypothecate trust or restricted property if (a) authorized by its constitution or charter or by a tribal referendum, and (b) approved by the Secretary of the Interior, and (3) shall comply with rules and regulations prescribed by the Secretary of Agriculture in connection with such loans.

(Pub. L. 91–229, §3, Apr. 11, 1970, 84 Stat. 120.)

§491. Mortgaged property governed by State law

Trust or restricted tribal or tribal corporation property mortgaged pursuant to sections 488 to 494 of this title shall be subject to foreclosure and sale or conveyance in lieu of foreclosure, free of such trust or restrictions, in accordance with the laws of the State in which the property is located.


§492. Interest rates and taxes


REFERENCES IN TEXT

The Consolidated Farmers Home Administration Act of 1961, referred to in text, is now the Consolidated Farm and Rural Development Act (Pub. L. 87–128, title III, Aug. 8, 1961, 75 Stat. 307, as amended). Subtitle D of the Consolidated Farm and Rural Development Act is classified principally to subchapter IV (§1981 et seq.) of chapter 50 of Title 7, Agriculture. For complete classification of this Act to the Code, see Short Title note set out under section 1921 of Title 7 and Tables.

Section 341 of that Act is set out as a note under section 1921 of Title 7.

AMENDMENTS


§493. Reduction of unpaid principal

(a) In general
The Secretary of Agriculture may, on the application of the borrower of a loan or loans made under sections 488 to 494 of this title, reduce the unpaid principal balance of such loan or loans to the current fair market value of the land purchased with the proceeds of the loan or loans if—

(1) the fair market value of the land has declined by at least 25 percent since such land was purchased by the borrower;
(2) the land has been held by the borrower for a period of at least 5 years; and
(3) the Secretary of the Interior finds that the borrower has insufficient income to both repay the loan or loans and provide normal tribal governmental services.

(b) Fair market value

(1) Appraisal

Current fair market value under subsection (a) of this section shall be determined through an appraisal by an independent qualified fee appraiser, selected by mutual agreement between the borrower and the Secretary of Agriculture.

(2) Costs

The cost of appraisals undertaken under paragraph (1) shall be paid by the borrower.

c) Appeals

Decisions of the Secretary of Agriculture under this section shall be appealable in accordance with the provisions of section 333B of the Consolidated Farm and Rural Development Act (7 U.S.C. 1983b).

d) Future applications

A borrower that had a loan or loans reduced under this section shall not submit an application for another reduction on such loan or loans for a period of 5 years after the initial reduction.


REFERENCES IN TEXT

CODIFICATION
Another section 6 of Pub. L. 91–229 was added by Pub. L. 101–624, title XVIII, §1854(b), Nov. 28, 1990, 104 Stat. 3837, and is classified to section 493 of this title.

§494. Authorization of appropriations

There are authorized to be appropriated to carry out sections 488 to 494 of this title $8,000,000 for each of the fiscal years 1991 through 1995.


CODIFICATION

§494a. Certification of rental proceeds
Notwithstanding any other provision of law, any actual rental proceeds from the lease of land acquired under section 488 of this title certified by the Secretary of the Interior shall be deemed—

(1) to constitute the rental value of that land; and

(2) to satisfy the requirement for appraisal of that land.


United States Supreme Court

MONTANA v. UNITED STATES, (1981)

No. 79-1128


By a tribal regulation, the Crow Tribe of Montana sought to prohibit hunting and fishing within its reservation by anyone who is not a member of the Tribe. Relying on its purported ownership of the bed of the Big Horn River, on treaties which created its reservation, and on its inherent power as a sovereign, the Tribe claimed authority to prohibit hunting and fishing by nonmembers of the Tribe even on lands within the reservation owned in fee simple by non-Indians. Montana, however, continued to assert its authority to regulate hunting and fishing by non-Indians within the reservation. The First Treaty of Fort Laramie of 1851, in which the signatory tribes acknowledged various designated lands as their respective territories, specified that, by making the treaty, the tribes did not "surrender the privilege of hunting, fishing, or passing over" any of the lands in dispute. In 1868, the Second Treaty of Fort Laramie established the Crow Reservation, including land through which the Big Horn River flows, and provided that the reservation "shall be . . . set apart for the absolute and undisturbed use and occupation" of the Tribe, and that no non-Indians except Government agents "shall ever be permitted to pass over, settle upon, or reside in" the reservation. To resolve the conflict between the Tribe and the State, the United States, proceeding in its own right and as fiduciary for the Tribe, filed the present action, seeking a declaratory judgment quieting title to the riverbed in the United States as trustee for the Tribe and establishing that the Tribe and the United States have sole authority to regulate hunting and fishing within the reservation, and an injunction requiring Montana to secure the Tribe's permission before issuing hunting or fishing licenses for use within the reservation. The District Court denied relief, but the Court of Appeals reversed. It held that the bed and banks of the river were held by the United States in trust for the Tribe; that the Tribe could regulate hunting and fishing within the reservation by nonmembers, except for hunting and fishing on fee lands by resident nonmember owners of those lands; and that nonmembers permitted by the Tribe to hunt or fish within the reservation remained subject to Montana's fish and game laws.

Held:

1. Title to the bed of the Big Horn River passed to Montana upon [450 U.S. 544, 545] its admission into the Union, the United States not having conveyed beneficial ownership of the riverbed to the Crow Tribe by the treaties of 1851 or 1868. As a general principle, the Federal Government holds lands under navigable waters in trust for future States, to be granted to such States when they enter the Union, and there is a strong presumption against conveyance of such lands by the United States. The 1851 treaty failed to overcome this presumption, since it did not
by its terms formally convey any land to the Indians at all. And whatever property rights the 1868 treaty created, its language is not strong enough to overcome the presumption against the sovereign's conveyance of the riverbed. Cf. United States v. Holt State Bank, 270 U.S. 49. Moreover, the situation of the Crow Indians at the time of the treaties presented no "public exigency" which would have required Congress to depart from its policy of reserving ownership of beds under navigable waters for the future States. Pp. 550-557.

2. Although the Tribe may prohibit or regulate hunting or fishing by nonmembers on land belonging to the Tribe or held by the United States in trust for the Tribe, it has no power to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe. Pp. 557-567.

(a) The 1851 treaty nowhere suggested that Congress intended to grant such power to the Tribe. And while the 1868 treaty obligated the United States to prohibit most non-Indians from residing on or passing through reservation lands used and occupied by the Tribe, thereby arguably conferring upon the Tribe authority to control fishing and hunting on those lands, that authority can only extend to land on which the Tribe exercises "absolute and undisturbed use and occupation" and cannot apply to subsequently alienated lands held in fee by non-Indians. Cf. Puyallup Tribe v. Washington Game Dept., 433 U.S. 165. Nor does the federal trespass statute, 18 U.S.C. 1165, which prohibits trespassing to hunt or fish, "augment" the Tribe's regulatory powers over non-Indian lands. That statute is limited to lands owned by Indians, held in trust by the United States for Indians, or reserved for use by Indians, and Congress deliberately excluded fee patented lands from its scope. Pp. 557-563.

(b) The Tribe's "inherent sovereignty" does not support its regulation of non-Indian hunting and fishing on non-Indian lands within the reservation. Through their original incorporation into the United States, as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty, particularly as to the relations between a tribe and nonmembers of the tribe. United States v. Wheeler, 435 U.S. 313. Exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. Here, regulation of hunting and fishing by nonmembers of the Tribe on lands no longer owned by the Tribe bears no clear relationship to tribal self-government or internal relations. Non-Indian hunters and fishermen on non-Indian fee land do not enter any agreements or dealings with the Tribe so as to subject themselves to tribal civil jurisdiction. And nothing suggests that such non-Indian hunting and fishing so threaten the Tribe's political or economic security as to justify tribal regulation. Pp. 563-567.

604 F.2d 1162, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, REHNQUIST, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, post, p. 567. BLACKMUN, J., filed an opinion dissenting in part, in which BRENNAN and MARSHALL, JJ., joined, post, p. 569.

Urban L. Roth, Special Assistant Attorney General of Montana, argued the cause for petitioners. With him on the briefs were Michael T. Greely, Attorney General, Clayton R. Herron and F. Woodside Wright, Special Assistant Attorneys General, James E. Seykora, and Douglas Y. Freeman.

Deputy Solicitor General Claiborne argued the cause for the United States. With him on the brief were Solicitor General McCree, Assistant Attorney General Moorman, Harlon L. Dalton, Robert L. Klarquist, and Steven E. Carroll.

Thomas J. Lynaugh argued the cause for respondent Crow Tribe of Indians. With him on the brief was Charles A. Hobbs. *

[ Footnote * ] Briefs of amici curiae urging reversal were filed by Warren Spannaus, Attorney General, James M. Schoessler, and Tom D. Tobin for the State of Minnesota et al.; by Slade Gorton, Attorney General, and Timothy R. Malone, Assistant Attorney General, for the State of Washington, joined by the
JUSTICE STEWART delivered the opinion of the Court.

This case concerns the sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians. Relying on its purported ownership of the bed of the Big Horn River, on the treaties which created its reservation, and on its inherent power as a sovereign, the Crow Tribe of Montana claims the authority to prohibit all hunting and fishing by nonmembers of the Tribe on non-Indian property within reservation boundaries. We granted certiorari, 445 U.S. 960, to review a decision of the United States Court of Appeals for the Ninth Circuit that substantially upheld this claim.

The Crow Indians originated in Canada, but some three centuries ago they migrated to what is now southern Montana. In the 19th century, warfare between the Crows and several other tribes led the tribes and the United States to sign the First Treaty of Fort Laramie of 1851, in which the signatory tribes acknowledged various designated lands as their respective territories. See 11 Stat. 749 and 2 C. Kappler, Indian Affairs: Laws and Treaties 594 (1904) (hereinafter Kappler). The treaty identified approximately 38.5 million acres as Crow territory and, in Article 5, specified that, by making the treaty, the tribes did not "surrender the privilege of hunting, fishing, or passing over" any of the lands in dispute. In 1868, the Second Treaty of Fort Laramie established a Crow Reservation of roughly 8 million acres, including land through which the Big Horn River flows. 15 Stat. 649. By Article II of the treaty, the United States agreed that the reservation "shall be . . . set apart for the absolute and undisturbed use and occupation" of the Crow Tribe, and that no non-Indians except agents of the Government "shall ever be permitted to pass over, settle upon, or reside in" the reservation.

Several subsequent Acts of Congress reduced the reservation to slightly fewer than 2.3 million acres. See 22 Stat. 42 (1882); 31, 26 Stat. 1039-1040 (1891); ch. 1624, 33 Stat. 352 (1904); ch. 890, 50 Stat. 884 (1937). In addition, the General Allotment Act of 1887, ch. 119, 24 Stat. 388, and the Crow Allotment Act of 1920, 41 Stat. 751, authorized the issuance of patents in fee to individual Indian allottees within the reservation. Under these Acts, an allottee could alienate his land to a non-Indian after holding it for 25 years. Today, roughly 52 percent of the reservation is allotted to members of the Tribe and held by the United States in trust for them, 17 percent is held in trust for the Tribe itself, and approximately 28 percent is held in fee by non-Indians. The State of Montana owns in fee simple 2 percent of the reservation, the United States less than 1 percent.
Since the 1920's, the State of Montana has stocked the waters of the reservation with fish, and the construction of a dam by the United States made trout fishing in the Big Horn River possible. The reservation also contains game, some of it stocked by the State. Since the 1950's, the Crow Tribal Council has passed several resolutions respecting hunting and fishing on the reservation, including Resolution No. 74-05, the occasion for this lawsuit. That resolution prohibits hunting and fishing within the reservation by anyone who is not a member of the Tribe. The State of Montana, however, has continued to assert its authority to regulate hunting and fishing by non-Indians within the reservation.

On October 9, 1975, proceeding in its own right and as fiduciary for the Tribe, the United States endeavored to resolve the conflict between the Tribe and the State by filing the present lawsuit. The plaintiff sought (1) a declaratory judgment quieting title to the bed of the Big Horn River in the United States as trustee for the Tribe, (2) a declaratory judgment establishing that the Tribe and the United States have sole authority to regulate hunting and fishing within the reservation, and (3) an injunction requiring Montana to secure the permission of the Tribe before issuing hunting or fishing licenses for use within the reservation.

The District Court denied the relief sought. 457 F. Supp. 599. In determining the ownership of the river, the court invoked the presumption that the United States does not intend to divest itself of its sovereign rights in navigable waters and reasoned that here, as in United States v. Holt State Bank, 270 U.S. 49, the language and circumstances of the relevant treaties were insufficient to rebut the presumption. The court thus concluded that the bed and banks of the river had remained in the ownership of the United States until they passed to Montana on its admission to the Union. As to the dispute over the regulation of hunting and fishing, the court found that "[i]mplicit in the Supreme Court's decision in Oliphant [v. Suquamish Indian Tribe, 435 U.S. 191,] is the recognition that Indian tribes do not have the power, nor do they have the authority, to regulate non-Indians unless so granted by an act of Congress." 457 F. Supp., at 609. Because no treaty or Act of Congress gave the Tribe authority to regulate hunting or fishing by non-Indians, the court held that the Tribe could not exercise such authority except by granting or withholding authority to trespass on tribal or Indian land. All other authority to regulate non-Indian hunting and fishing resided concurrently in the State of Montana and, under 18 U.S.C. 1165 (which makes it a federal offense to trespass on Indian land to hunt or fish without permission), the United States.

The Court of Appeals reversed the judgment of the District Court. 604 F.2d 1162. Relying on its opinion in United States v. Finch, 548 F.2d 822, vacated on other grounds, 433 U.S. 676, the appellate court held that, pursuant to the treaty of 1868, the bed and banks of the river were held by the United States in trust for the Tribe. Relying on the treaties of 1851 and 1868, the court held that the Tribe could regulate hunting and fishing within the reservation by nonmembers, although the court noted that the Tribe could not impose criminal sanctions on those nonmembers. The court also held, however, that the two Allotment Acts implicitly deprived the Tribe of the authority to prohibit hunting and fishing on fee lands by resident nonmember owners of those lands. Finally, the court held that nonmembers permitted by the Tribe to hunt or fish within the reservation remained subject to Montana's fish and game laws.

II

The respondents seek to establish a substantial part of their claim of power to control hunting and fishing on the reservation by asking us to recognize their title to the bed of the Big Horn River. The question is whether the United States conveyed beneficial ownership of the riverbed to the Crow Tribe by the treaties of 1851 or 1868, and therefore continues to hold the land in trust for the use and benefit of the Tribe, or whether the United States retained ownership of the riverbed as public land which then passed to the State of Montana upon its admission to the Union. Choctaw Nation v. Oklahoma, 397 U.S. 620, 627-628.

Though the owners of land riparian to nonnavigable streams may own the adjacent riverbed, conveyance by the United States of land riparian to a navigable river carries no interest in the riverbed. Packer v. Bird, 137 U.S. 661, 672; Railroad Co. v. Schurmeir, 7 Wall. 272, 289; 33 U.S.C. 10; 43 U.S.C. 931. Rather, the
ownership of land under navigable waters is an incident of sovereignty. Martin v. Waddell, 16 Pet. 367, 409-411. As a general principle, the Federal Government holds such lands in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an "equal footing" with the established States. Pollard's Lessee v. Hagan, 3 How. 212, 222-223, 229. After a State enters the Union, title to the land is governed by state law. The State's power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce. United States v. Oregon, 295 U.S. 1, 14. It is now established, however, that Congress may sometimes convey lands below the high-water mark of a navigable water.

"[and so defeat the title of a new State,] in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." Shively v. Bowlby, 152 U.S. 1, 48. But because control over the property underlying navigable waters is so strongly identified with the sovereign power of government, United States v. Oregon, supra, at 14, it will not be held that the United States has conveyed such land except because of "some international duty or public exigency." United States v. Holt State Bank, 270 U.S., at 55. See also Shively v. Bowlby, supra, at 48. A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States, United States v. Oregon, supra, at 14, and must not infer such a conveyance "unless the intention was definitely declared or otherwise made plain," United States v. Holt State Bank, supra, at 55, or was rendered "in clear and especial words," Martin v. Waddell, supra, at 411, or "unless the claim confirmed in terms embraces the land under the waters of the stream," Packer v. Bird, supra, at 672.

In United States v. Holt State Bank, supra, this Court applied these principles to reject an Indian Tribe's claim of title to the bed of a navigable lake. The lake lay wholly within the boundaries of the Red Lake Indian Reservation, which had been created by treaties entered into before Minnesota joined the Union. In these treaties the United States promised to "set apart and withhold from sale, for the use of" the Chippewas, a large tract of land, Treaty of Sept. 30, 1854, 10 Stat. 1109, and to convey "a sufficient quantity of land for the permanent homes" of the Indians, Treaty of Feb. 22, 1855, 10 Stat. 1165. See Minnesota v. Hitchcock, 185 U.S. 373, 389. The Court concluded that there was nothing in the treaties "which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose [450 U.S. 544, 553] to depart from the established policy . . . of treating such lands as held for the benefit of the future State." United States v. Holt State Bank, 270 U.S., at 58-59. Rather, "[t]he effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory." Id., at 58.

The Crow treaties in this case, like the Chippewa treaties in Holt State Bank, fail to overcome the established presumption that the beds of navigable waters remain in trust for future States and pass to the new States when they assume sovereignty. The 1851 treaty did not by its terms formally convey any land to the Indians at all, but instead chiefly represented a covenant among several tribes which recognized specific boundaries for their respective territories. Treaty of Fort Laramie, 1851, Art. 5, 2 Kappler 594-595. It referred to hunting and fishing only insofar as it said that the Crow Indians "do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described," a statement that had no bearing on ownership of the riverbed. By contrast, the 1868 treaty did expressly convey land to the Crow Tribe. Article II of the treaty described the reservation land in detail and stated that such land would be "set apart for the absolute and undisturbed use and occupation of the Indians herein named . . . ." Second Treaty of Fort Laramie, May 7, 1868, Art. II, 15 Stat. 650. The treaty then stated:

"[T]he United States now solemnly agrees that no persons, except those herein designated and authorized to [450 U.S. 544, 554] do so, and except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservations in discharge of duties
enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians . . . ." Ibid.

Whatever property rights the language of the 1868 treaty created, however, its language is not strong enough to overcome the presumption against the sovereign's conveyance of the riverbed. The treaty in no way expressly referred to the riverbed, Packer v. Bird, 137 U.S., at 672, nor was an intention to convey the riverbed expressed in "clear and especial words," Martin v. Waddell, 16 Pet., at 411, or "definitely declared or otherwise made very plain," United States v. Holt State Bank, 270 U.S., at 55. Rather, as in Holt, "[t]he effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory." Id., at 58.

Though Article 2 gave the Crow Indians the sole right to use and occupy the reserved land, and, implicitly, the power to exclude others from it, the respondents' reliance on that provision simply begs the question of the precise extent of the conveyed lands to which this exclusivity attaches. The mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance. In the Court of Appeals' Finch decision, on which recognition of the Crow Tribe's title to the riverbed rested in this case, that court construed the language of exclusivity in the 1868 treaty as granting to the Indians all the lands, including the riverbed, within the described boundaries. United States v. Finch, 548 F.2d, at 829. Such a construction, however, cannot survive examination. [450 U.S. 544, 555] As the Court of Appeals recognized, ibid., and as the respondents concede, the United States retains a navigational easement in the navigable waters lying within the described boundaries for the benefit of the public, regardless of who owns the riverbed. Therefore, such phrases in the 1868 treaty as "absolute and undisturbed use and occupation" and "no persons, except those herein designated . . . shall ever be permitted," whatever they seem to mean literally, do not give the Indians the exclusive right to occupy all the territory within the described boundaries. Thus, even if exclusivity were the same as ownership, the treaty language establishing this "right of exclusivity" could not have the meaning that the Court of Appeals ascribed to it. 5 [450 U.S. 544, 556]

Moreover, even though the establishment of an Indian reservation can be an "appropriate public purpose" within the meaning of Shively v. Bowlby, 152 U.S., at 48, justifying a congressional conveyance of a riverbed, see, e. g., Alaska Pacific Fisheries v. United States, 248 U.S. 78, 85, the situation of the Crow Indians at the time of the treaties presented no "public exigency" which would have required Congress to depart from its policy of reserving ownership of beds under navigable waters for the future States. See Shively v. Bowlby, supra, at 48. As the record in this case shows, at the time of the treaty the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life. 1 App. 74. Cf., Alaska Pacific Fisheries v. United States, supra, at 88; Skokomish Indian Tribe v. France, 320 F.2d 205, 212 (CA9).

For these reasons, we conclude that title to the bed of the Big Horn River passed to the State of Montana upon its [450 U.S. 544, 557] admission into the Union, and that the Court of Appeals was in error in holding otherwise.

III

Though the parties in this case have raised broad questions about the power of the Tribe to regulate hunting and fishing by non-Indians on the reservation, the regulatory issue before us is a narrow one. The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe, 604 F.2d, at 1165-1166, and with this holding we can readily agree. We also agree with the Court of Appeals that if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits. Ibid. What remains is the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe. The Court of Appeals held that, with respect to fee-patented lands, the Tribe may regulate, but may not prohibit, hunting and fishing by non-members resident owners or by those, such as tenants or employees, whose occupancy is
authorized by the owners. Id., at 1169. The court further held that the Tribe may totally prohibit hunting and fishing on lands within the reservation owned by non-Indians who do not occupy that land. Ibid.

The Court of Appeals found two sources for this tribal regulatory power: the Crow treaties, "augmented" by 18 U.S.C. 1165, and "inherent" Indian sovereignty. We believe that neither source supports the court's conclusion.

A

The purposes of the 1851 treaty were to assure safe passage for settlers across the lands of various Indian Tribes; to compensate the Tribes for the loss of buffalo, other game animals, timber, and forage; to delineate tribal boundaries; to promote intertribal peace; and to establish a way of identifying Indians who committed depredations against non-Indians. As noted earlier, the treaty did not even create a reservation, although it did designate tribal lands. See Crow Tribe v. United States, 151 Ct. Cl. 281, 285-286, 289, 292, 293, 284 F.2d 361, 364, 366, 368. Only Article 5 of that treaty referred to hunting and fishing, and it merely provided that the eight signatory tribes "do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." 2 Kappler 595. 6 The treaty nowhere suggested that Congress intended to grant authority to the Crow Tribe to regulate hunting and fishing by nonmembers on nonmember lands. Indeed, the Court of Appeals acknowledged that after the treaty was signed non-Indians, as well as members of other Indian tribes, undoubtedly hunted and fished within the treaty-designated territory of the Crows. 604 F.2d. at 1167.

The 1868 Fort Laramie Treaty, 15 Stat. 649, reduced the size of the Crow territory designated by the 1851 treaty. Article II of the treaty established a reservation for the Crow Tribe and provided that it be "set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them . . . ." (emphasis added) and that "the United States now solemnly agrees that no persons, except those herein designated and authorized so to do . . . shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians . . . ." The treaty, therefore, obligated the United States to prohibit most non-Indians from residing on or passing through reservation lands used and occupied by the Tribe, and, thereby, arguably conferred upon the Tribe the authority to control fishing and hunting on those lands. 7 But that authority could only extend to land on which the Tribe exercises "absolute and undisturbed use and occupation." And it is clear that the quantity of such land was substantially reduced by the allotment and alienation of tribal lands as a result of the passage of the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. 331 et seq., and the Crow Allotment Act of 1920, 41 Stat. 751. 8 If the 1868 treaty created tribal power to restrict or prohibit non-Indian hunting and fishing on the reservation, that power cannot apply to lands held in fee by non-Indians. 9

In Puyallup Tribe v. Washington Game Dept., 433 U.S. 165 (Puyallup III), the relevant treaty included language virtually identical to that in the 1868 Treaty of Fort Laramie. The Puyallup Reservation was to be "set apart, and, so far as necessary, surveyed and marked out for their exclusive use . . . ." See id., at 174. The Puyallup Tribe argued that those words amounted to a grant of authority to fish free of state interference. But this Court rejected that argument, finding, in part, that it "clash[e]d with the subsequent history of the reservation . . . ." ibid., notably two Acts of Congress under which the Puyallups alienated, in fee simple, the great majority of the lands in the reservation, including all the land abutting the Puyallup River. Thus, "[n]either the Tribe nor its members continue to hold Puyallup River fishing grounds for their `exclusive use.'" Ibid. Puyallup III indicates, therefore, that treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands. Accordingly, the language of the 1868 treaty provides no support for tribal authority to regulate hunting and fishing on land owned by non-Indians.

The Court of Appeals also held that the federal trespass statute, 18 U.S.C. 1165, somehow "augmented" the Tribe's regulatory powers over non-Indian land. 604 F.2d, at 1167. If anything, however, that statute
suggests the absence of such authority, since Congress deliberately excluded fee-patented lands from the statute's scope. The statute provides:

"Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltres, or fish therefrom, shall be fined . . . ."

The statute is thus limited to lands owned by Indians, held in trust by the United States for Indians, or reserved for use by Indians. If Congress had wished to extend tribal jurisdiction to lands owned by non-Indians, it could easily have done so by incorporating in 1165 the definition of "Indian country" in 18 U.S.C. 1151: "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." Indeed, a Subcommittee of the House Committee on the Judiciary proposed that this be done. But the Department of the Interior recommended against doing so in a letter dated May 23, 1958. The Department pointed out that a previous congressional Report, H. R. Rep. No. 2593, 85th Cong., 2d Sess. (1958), had made clear that the bill contained no implication that it would apply to land other than that held or controlled by Indians or the United States. The Committee on the Judiciary then adopted the present language, which does not reach fee-patented lands within the boundaries of an Indian reservation.

Beyond relying on the Crow treaties and 18 U.S.C. 1165 as source for the Tribe's power to regulate non-Indian hunting and fishing on non-Indian lands within the reservation, the Court of Appeals also identified that power as an incident of the inherent sovereignty of the Tribe over the entire Crow Reservation. 604 F.2d, at 1170. But "inherent sovereignty" is not so broad as to support the application of Resolution No. 74-05 to non-Indian lands.

This Court most recently reviewed the principles of inherent sovereignty in United States v. Wheeler, 435 U.S. 313. In that case, noting that Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory," id., at 323, the Court upheld the power of a tribe to punish tribal members who violate tribal criminal laws. But the Court was careful to note that, through their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty. Id., [450 U.S. 544, 564] at 326. The Court distinguished between those inherent powers retained by the tribes and those divested:

"The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe. . . . These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status." Ibid. (Emphasis added.)

Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. Id., at 322, n. 18. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148; Williams v. Lee, 358 U.S. 217, 219-220; United States v. Kagama, 118 U.S. 375, 381-382; see McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 171. Since regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations, [450 U.S. 544, 565] the general principles of retained inherent sovereignty did not authorize the Crow Tribe to adopt Resolution No. 74-05.
The Court recently applied these general principles in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, rejecting a tribal claim of inherent sovereign authority to exercise criminal jurisdiction over non-Indians. Stressing that Indian tribes cannot exercise power inconsistent with their diminished status as sovereigns, the Court quoted Justice Johnson's words in his concurrence in Fletcher v. Peck, 6 Cranch 87, 147 - the first Indian case to reach this Court - that the Indian tribes have lost any "right of governing every person within their limits except themselves." 435 U.S., at 209. Though Oliphant only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. Williams v. Lee, supra, at 223; Morris v. Hitchcock, 194 U.S. 384; [450 U.S. 544, 566].

Buster v. Wright, 135 F. 947, 950 (CA8); see Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 152-154. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. See Fisher v. District Court, 424 U.S. 382, 386; Williams v. Lee, supra, at 220; Montana Catholic Missions v. Missoula County, 200 U.S. 118, 128-129; Thomas v. Gay, 169 U.S. 264, 273.

No such circumstances, however, are involved in this case. Non-Indian hunters and fishermen on non-Indian fee land do not enter any agreements or dealings with the Crow Tribe so as to subject themselves to tribal civil jurisdiction. And nothing in this case suggests that such non-Indian hunting and fishing so threaten the Tribe's political or economic security as to justify tribal regulation. The complaint in the District Court did not allege that non-Indian hunting and fishing on fee lands imperil the subsistence or welfare of the Tribe. Furthermore, the District Court made express findings, left unaltered by the Court of Appeals, that the Crow Tribe has traditionally accommodated itself to the State's "near exclusive" regulation of hunting and fishing on fee lands within the reservation. 457 F. Supp., at 609-610. And the District Court found that Montana's statutory and regulatory scheme does not prevent the Crow Tribe from limiting or forbidding non-Indian hunting and fishing on lands still owned by or held in trust for the Tribe or its members. Id., at 609.

IV

For the reasons stated in this opinion, the judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings.

It is so ordered.

Footnotes

[Footnote 1] ERRATA: Insert "very" after "made".

[Footnote 1] According to the respondents, the Crow Tribe's interest in restricting hunting and fishing on the reservation focuses almost entirely on sports fishing and duck hunting in the waters and on the surface of the Big Horn River. The parties, the District Court, and the Court of Appeals have all assumed that ownership of the riverbed will largely determine the power to control these activities. Moreover, although the complaint in this case sought to quiet title only to the bed of the Big Horn River, we note the concession of the United States that if the bed of the river passed to Montana upon its admission to the Union, the State at the same time acquired ownership of the banks of the river as well.

[Footnote 2] Congress was, of course, aware of this presumption once it was established by this Court. See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 588.
The Hitchcock decision expressly stated that the Red Lake Reservation was "a reservation within the accepted meaning of the term." 185 U.S., at 389.

"[C]ommencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory; thence north along said 107th meridian to the mid-channel of the Yellowstone River; thence up said mid-channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude; and thence east along said parallel of latitude to the place of beginning . . . ." Second Treaty of Fort Laramie, May 7, 1868, Art. II, 15 Stat. 650.

In one recent case, Choctaw Nation v. Oklahoma, 397 U.S. 620, this Court did construe a reservation grant as including the bed of a navigable water, and the respondents argue that this case resembles Choctaw Nation more than it resembles the established line of cases to which Choctaw Nation is a singular exception. But the finding of a conveyance of the riverbed in Choctaw Nation was based on very peculiar circumstances not present in this case.

Those circumstances arose from the unusual history of the treaties there at issue, a history which formed an important basis of the decision. Id., at 622-628. Immediately after the Revolutionary War, the United States had signed treaties of peace and protection with the Cherokee and Choctaw Tribes, reserving them lands in Georgia and Mississippi. In succeeding years, the United States bought large areas of land from the Indians to make room for white settlers who were encroaching on tribal lands, but the Government signed new treaties guaranteeing that the Indians could live in peace on those lands not ceded. The United States soon betrayed that promise. It proposed that the Tribes be relocated in a newly acquired part of the Arkansas Territory, but the new territory was soon overrun by white settlers, and through a series of new cession agreements the Indians were forced to relocate farther and farther west. Ultimately, most of the Tribes' members refused to leave their eastern lands, doubting the reliability of the Government's promises of the new western land, but Georgia and Mississippi, anxious for the relocation westward so they could assert jurisdiction over the Indian lands, purported to abolish the Tribes and distribute the tribal lands. The Choctaws and Cherokees finally signed new treaties with the United States aimed at rectifying their past suffering at the hands of the Federal Government and the States.

Under the Choctaw treaty, the United States promised to convey new lands west of the Arkansas Territory in fee simple, and also pledged that "no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation . . . and that no part of the land granted to them shall ever be embraced in any Territory or State." Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333-334, quoted in Choctaw Nation v. Oklahoma. 397 U.S., at 625. In 1835, the Cherokees signed a treaty containing similar provisions granting reservation lands in fee simple and promising that the tribal lands would not become part of any State or Territory. Id., at 626. In concluding that the United States had intended to convey the riverbed to the Tribes before the admission of Oklahoma to the Union, the Choctaw Court relied on these circumstances surrounding the treaties and placed special emphasis on the Government's promise that the reserved lands would never become part of any State. Id., at 634-635. Neither the special historical origins of the Choctaw and Cherokee treaties nor the crucial provisions granting Indian lands in fee simple and promising freedom from state jurisdiction in those treaties have any counterparts in the terms and circumstances of the Crow treaties of 1851 and 1868.

The complaint in this case did not allege that non-Indian hunting and fishing on reservation lands has impaired this privilege.

Article IV of the treaty addressed hunting rights specifically. But that Article referred only to "unoccupied lands of the United States," viz., lands outside the reservation boundaries, and is accordingly not relevant here.
The 1920 Crow Allotment Act was one of the special Allotment Acts Congress passed from time to time pursuant to the policy underlying the General Allotment Act. See S. Rep. No. 219, 66th Cong., 1st Sess., 5 (1919). The Senate Committee Report on the Crow Allotment bill stated that it "is in accordance with the policy to which Congress gave its adherence many years ago, and which found expression in the [General Allotment Act]." Ibid.

The Court of Appeals discussed the effect of the Allotment Acts as follows:

"While neither of these Acts, nor any other to which our attention has been called, explicitly qualifies the Tribe's rights over hunting and fishing, it defies reason to suppose that Congress intended that non-members who reside on fee patent lands could hunt and fish thereon only by consent of the Tribe. So far as the record of this case reveals, no efforts to exclude completely non-members of the Crow Tribe from hunting and fishing within the reservation were being made by the Crow Tribe at the time of enactment of the Allotment Acts." 604 F.2d 1162, 1168 (footnote omitted).


There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction. See, e. g., id., at 785 (Sen. Morgan), 875 (Sen. Hoar), 876 (Sen. Morgan), 878 (Sens. Hoar and Coke), 881 (Sen. Brown), 908 (Sen. Call), 939 (Sen. Teller), 1028 (Sen. Hoar), 1067 (Sens. Edmonds and Williams). It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government. And it is hardly likely that Congress could have imagined that the purpose of peaceful assimilation could be advanced if feeholders could be excluded from fishing or hunting on their acquired property.

The policy of allotment and sale of surplus reservation land was, of course, repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. 461 et seq. But what is relevant in this case is the effect of the land alienation occasioned by that policy on Indian treaty rights tied to Indian use and occupation of reservation land.


House Report No. 2593 stated that the purpose of the bill that became 18 U.S.C. 1165 was to make it unlawful to enter Indian land to hunt, trap, or fish without the consent of the individual Indian or tribe:
“Indian property owners should have the same protection as other property owners, for example, a private hunting club may keep nonmembers off its game lands or it may issue a permit for a fee. One who comes on such lands without permission may be prosecuted under State law but a non-Indian trespasser on an Indian reservation enjoys immunity.

Non-Indians are not subject to the jurisdiction of Indian courts and cannot be tried in Indian courts on trespass charges. Further, there are no Federal laws which can be invoked against trespassers.” H. R. Rep. No. 2593, 85th Cong., 2d Sess., at 2.


Before the Court of Appeals decision, several other courts interpreted 1165 to be confined to lands owned by Indians, or held in trust for their benefit. State v. Baker, 464 F. Supp. 1377 (WD Wis.); United States v. Bouchard, 464 F. Supp. 1316 (WD Wis.); United States v. Pollmann, supra; Donahue v. California Justice Court, 15 Cal. App. 3d 557, 93 Cal. Rptr. 310. Cf. United States v. Sanford, 547 F.2d 1085, 1089 (CA9) (holding that 1165 was designed to prevent encroachments on Indian lands, rejecting the argument that 1165 makes illegal the unauthorized killing of wildlife on an Indian reservation, and noting that "the application of Montana game laws to the activities of non-Indians on Indian reservations does not interfere with tribal self-government on reservations").

[Footnote 13] Any argument that Resolution No. 74-05 is necessary to Crow tribal self-government is refuted by the findings of the District Court that the State of Montana has traditionally exercised "near exclusive" jurisdiction over hunting and fishing on fee lands within the reservation, and that the [450 U.S. 544, 565] parties to this case had accommodated themselves to the state regulation. 457 F. Supp. 599, 610. The Court of Appeals left these findings unaltered and indeed implicitly reaffirmed them, adding that the record reveals no attempts by the Tribe at the time of the Crow Allotment Act to forbid non-Indian hunting and fishing on reservation lands. 604 F.2d, at 1168, and n. 11A.

[Footnote 14] By denying the Suquamish Tribe criminal jurisdiction over non-Indians, however, the Oliphant case would seriously restrict the ability of a tribe to enforce any purported regulation of non-Indian hunters and fishermen. Moreover, a tribe would not be able to rely for enforcement on the federal criminal trespass statute, 18 U.S.C. 1165, since that statute does not apply to fee patented lands. See supra, at 561-563, and nn. 10-12.

[Footnote 15] As a corollary, this Court has held that Indian tribes retain rights to river waters necessary to make their reservations livable. Arizona v. California, 373 U.S. 546, 599.

[Footnote 16] Similarly, the complaint did not allege that the State has abdicated or abused its responsibility for protecting and managing wildlife, has established its season, bag, or creel limits in such a way as to impair the Crow Indians’ treaty rights to fish or hunt, or has imposed less stringent hunting and fishing regulations within the reservation than in other parts of the State. Cf. United States v. Washington, 384 F. Supp. 312, 410-411 (WD Wash.), aff’d, 520 F.2d 676 (CA9).

JUSTICE STEVENS, concurring.

In its opinion in Choctaw Nation v. Oklahoma, 397 U.S. 620, the Court repeatedly pointed out that ambiguities in the governing treaties should be resolved in favor of the Indian tribes. 1 That emphasis on a rule of construction favoring the tribes might arguably be read as having been intended to indicate that the strong presumption against dispositions [450 U.S. 544, 568] by the United States of land under
Navigable waters in the territories is not applicable to Indian reservations. However, for the following reasons, I do not so read the Choctaw Nation opinion.

In United States v. Holt State Bank, 270 U.S. 49, the Court unanimously and unequivocally had held that the presumption applied to Indian reservations. Although the references to Holt State Bank in the Court's opinion in Choctaw Nation can hardly be characterized as enthusiastic, see 397 U.S., at 634, the Choctaw Nation opinion did not purport to abandon or to modify the rule of Holt State Bank. Indeed, Justice Douglas, while joining the opinion of the Court, wrote a separate opinion to explain why he had concluded that the Choctaw Nation record supplied the "exceptional circumstances" required under the Holt State Bank rule. 2

Only seven Justices participated in the Choctaw Nation decision. 3 JUSTICE WHITE, joined by THE CHIEF JUSTICE and Justice Black in dissent, relied heavily on the Holt State Bank line of authority, see 397 U.S., at 645-648, and, as I noted above, Justice Douglas, in his concurrence, also appears to have accepted the Holt State Bank rule. Because only four Justices, including Justice Douglas, joined the Court's opinion, I do not believe it should be read as having made a substantial change in settled law. [450 U.S. 544, 569]

Finally, it is significant for me that JUSTICE STEWART, who joined the Choctaw Nation opinion, is the author of the Court's opinion today. Just as he is, I am satisfied that the circumstances of the Choctaw Nation case differ significantly from the circumstances of this case. Whether I would have voted differently in the two cases if I had been a Member of the Court when Choctaw Nation was decided is a question I cannot answer. I am, however, convinced that unless the Court is to create a broad exception for Indian reservations, the Holt State Bank presumption is controlling. I therefore join the Court's opinion.

[Footnote 1] The Court described this rule of construction, and explained the reasoning underlying it:

"[T]hese treaties are not to be considered as exercises in ordinary conveyancing. The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians must be interpreted as they would have understood them, see, e.g., Jones v. Meehan, 175 U.S. 1, 11 (1899), and any doubtful expressions in them should be resolved in the Indians' favor. See Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918). Indeed, the Treaty of Dancing Rabbit Creek itself provides that "in the construction of this Treaty wherever well founded doubt shall arise, it shall be construed most favourably towards the Choctaws." 7 Stat. 336." 397 U.S., at 630-631.

The Court went on to base its decision on this rule of construction:

"[T]he court in [United States v.] Holt State Bank [270 U.S. 49] itself examined the circumstances in detail and concluded 'the reservation was not intended to effect such a disposal.' 270 U.S., at 58. We think that the similar conclusion of the Court of Appeals in this case was in error, given the circumstances of the treaty grants and the countervailing rule of construction that well-founded doubt should be resolved in petitioners' favor." Id., at 634.

[Footnote 2] Before reviewing the history of the Cherokee and Choctaw Reservations, Justice Douglas wrote:

"[W]hile the United States holds a domain as a territory, it may convey away the right to the bed of a navigable river, not retaining that property for transfer to a future State, though as stated in Holt State Bank that purpose is 'not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.' 270 U.S., at 55. Such exceptional circumstances are present here." 397 U.S., at 639.
When Choctaw Nation was decided, the Court consisted of only eight active Justices. Justice Harlan did not participate in the consideration or decision of Choctaw Nation.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting in part.

Only two years ago, this Court reaffirmed that the terms of a treaty between the United States and an Indian tribe must be construed “in the sense in which they would naturally be understood by the Indians.” Washington v. Fishing Vessel Assn., 443 U.S. 658, 676 (1979), quoting from Jones v. Meehan, 175 U.S. 1, 11 (1899). In holding today that the bed of the Big Horn River passed to the State of Montana upon its admission to the Union, the Court disregards this settled rule of statutory construction. Because I believe that the United States intended, and theCrow Nation understood, that the bed of the Big Horn was to belong to the Crow Indians, I dissent from so much of the Court's opinion as holds otherwise.

As in any case involving the construction of a treaty, it is necessary at the outset to determine what the parties intended. Washington v. Fishing Vessel Assn., 443 U.S., at 675. With respect to an Indian treaty, the Court has said that “the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side.” Id., at 675-676. Obviously, this rule is applicable here. But before determining what the Crow Indians must have understood the Treaties of Fort Laramie to mean, it is appropriate to ask what the United States intended, for our inquiry need go no further if the United States meant to convey the bed of the Big Horn River to the Indians.

The Court concedes that the establishment of an Indian reservation can be an “appropriate public purpose” justifying a congressional conveyance of a riverbed. Ante, at 556. It holds, however, that no such public purpose or exigency could have existed here, since at the time of the Fort Laramie Treaties the Crow were a nomadic tribe dependent chiefly upon buffalo, and fishing was not important to their diet or way of life. Ibid. The factual premise upon which the Court bases its conclusion is open to serious question: while the District Court found that fish were not “a central part of the Crow diet,” 457 F. Supp. 599, 602 (Mont. 1978), there was evidence at trial that the Crow ate fish both as a supplement to their buffalo diet and as a substitute for meat in time of scarcity.

Even if it were true that fishing was not important to the Crow Indians at the time the Fort Laramie Treaties came into being, it does not necessarily follow that there was no public purpose or exigency that could have led Congress to convey the riverbed to the Crow. Indeed, history informs us that the very opposite was true. In negotiating these treaties, the United States was actuated by two somewhat conflicting purposes: the desire to provide for the Crow Indians, and the desire to obtain the cession of all Crow territory not within the ultimate reservation's boundaries. Retention of ownership of the riverbed for the benefit of the future state of Montana would have been inconsistent with each of these purposes.

First: It was the intent of the United States that the Crow Indians be converted from a nomadic, hunting tribe to a settled, agricultural people. The Treaty of Fort Laramie of Sept. 17, 1851, see 11 Stat. 749, and 2 C. Kappler, Indian Affairs: Laws and Treaties 594 (1904) (hereinafter Kappler), was precipitated by the depletion of game, timber, and forage by the constantly increasing number of settlers who crossed the lands of the Plains Indians on their way to California. Aggrieved by these depredations, the Indians had opposed that passage, sometimes by force. In order to ensure safe passage for the settlers, the United States in 1851 called together at Fort Laramie eight Indian Nations, including the Crow. The agreement made at that time by the United States Commissioner emphasized the Government's concern over the destruction of the game upon which the Indians depended. The treaty's Art. 5, which set specified boundaries for the Indian Nations, explicitly provided that the signatory tribes "do not surrender the privilege of hunting, fishing, or passing over any of the tracts" described in the
treaty, 2 Kappler, at 595 (emphasis added), and, further, its Art. 7 stated that the United States would provide an annuity in the form of "provisions, merchandise, domestic animals, and agricultural implements." Ibid.

The intent of the United States to provide alternative means of subsistence for the Plains Indians is demonstrated even more clearly by the subsequent Fort Laramie Treaty of May 7, 1868, between the United States and the Crow Nation. 15 Stat. 649. United States Commissioner Taylor, who met with the Crow Indians in 1867, had acknowledged to them that the game upon which they relied was "fast disappearing," and had stated that the United States proposed to furnish them with "homes and cattle, to enable you to begin to raise a supply or stock with which to support your families when the game was disappeared." 6 6. Proceedings of the Great Peace Commission of 1867-1868, pp. 86-87 (Institute for the Development of Indian Law (1975)) (hereinafter Proceedings). Given this clear recognition by the United States that the traditional mainstay of the Crow Indians' diet was disappearing, it is inconceivable that the United States intended by the 1868 treaty to deprive the Crow of "potential control over a source of food on their reservation." 7 7. United States v. Finch, 548 F.2d 822, 832 (CA9 1976), vacated on other grounds, 433 U.S. 676 (1977). See Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918).

Second: The establishment of the Crow Reservation was [450 U.S. 544, 574] necessitated by the same "public purpose" or "exigency" that led to the creation of the Choctaw and Cherokee Reservations discussed in Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970). In both cases, Congress responded to pressure for Indian land by establishing reservations in return for the Indians' relinquishment of their claims to other territories. 9 9. Just as the Choctaws and the Cherokees received their reservation in fee simple "to inure to them while they shall exist as a nation and live on it," id., at 625, so the Crow were assured in 1867 that they would receive "a tract of your country as a home for yourselves and children forever, upon which your great Father will not permit the white man to trespass." Proceedings, at 86. Indeed, during the negotiations of both the 1851 and 1868 Treaties of Fort Laramie the United States repeatedly referred to the land as belonging to the Indians, and the treaties reflect this understanding. 10 10. [450 U.S. 544, 575] Finally, like the Cherokee Reservation, see 397 U.S., at 628, the Crow Reservation created by Art. II of the 1868 treaty consisted of "one undivided tract of land described merely by exterior metes and bounds." 15 Stat. 650.

Since essentially the same "public purpose" led to the creation of both reservations, it is highly appropriate that the analysis of Choctaw Nation be applied in this case. As the State of Montana does here, the State of Oklahoma in Choctaw Nation claimed a riverbed that was surrounded on both sides by lands granted to an Indian tribe. This Court in Choctaw Nation found Oklahoma's claim to be "at the least strained," and held that all the land inside the reservation's exterior metes and bounds, including the riverbed, "seems clearly encompassed within the grant," even though no mention had been made of the bed. 397 U.S., at 628. The Court found that the "natural inference" to be drawn from the grants to the Choctaws and Cherokees was that "all the land within their metes and bounds was conveyed, including the banks and bed of rivers." Id., at 634. See also Donnelly v. United States, 228 U.S. 243, 259 (1913). The [450 U.S. 544, 576] Court offers no plausible explanation for its failure to draw the same "natural inference" here. 11

In Choctaw Nation, the State of Oklahoma also laid claim to a portion of the Arkansas River at the border of the Indian reservation. The Court's analysis of that claim lends weight to the conclusion that the bed of the Big Horn belongs to the Crow Indians. Interpreting the treaty language setting the boundary of the Cherokee Reservation "down the main channel of the Arkansas river," the Choctaw Court noted that such language repeatedly has been held to convey title to the midpoint of the channel, relying on Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77 (1922). 12 12. [450 U.S. 544, 577] Fort Laramie established the boundary of the Crow Reservation as running in part up the "mid-channel of the Yellowstone river." 15 Stat. 650. Thus, under Brewer-Elliott and Choctaw Nation, it is clear that the United States intended to grant the Crow the bed of the Yellowstone to the midpoint of the channel; it follows a fortiori that it was the intention of the United States to grant the Crow Indians the bed of that portion of the Big Horn that was totally encompassed by the reservation. 13
But even assuming, arguendo, that the United States intended to retain title to the bed of the Big Horn River for the benefit of the future State of Montana, it defies common sense to suggest that the Crow Indians would have so understood the terms of the Fort Laramie Treaties. In negotiating the 1851 treaty, the United States repeatedly referred to the territories at issue as "your country," as "your land," and as "your territory." See Crow Tribe of Indians v. United States, 151 Ct. Cl. 281, 287-291, 284 F.2d 361, 364-367 (1960). Further, in Art. 3 of the treaty itself the Government undertook to protect the signatory tribes "against the commission of all depredations by the people of the said United States," and to compensate the tribes for any damages [450 U.S. 544, 578] they suffered thereby; in return, in Art. 2, the United States received the right to build roads and military posts on the Indians' territories. 2 Kappler, at 594.

The history of the treaty of 1868 is even more telling. By this time, whites were no longer simply passing through the Indian territories on their way to California. Instead, in the words of United States Commissioner Taylor, who addressed the Crow representatives gathered at Fort Laramie in 1867:

"We learn that valuable mines have been discovered in your country which in some instances are taken possession of by the whites. We learn that roads are laid out and travelled through your lands, that settlements have been made upon your lands, that your game is being driven away and is fast disappearing. We know also that the white people are rapidly increasing and are taking possession of and occupying all the valuable lands. Under these circumstances we are sent by the great Father and the Great Council in Washington to arrange some plan to relieve you, as far as possible, from the bad consequences of this state of things and to protect you from future difficulties." Proceedings, at 86. (Emphasis added.)

It is hardly credible that the Crow Indians who heard this declaration would have understood that the United States meant to retain the ownership of the riverbed that ran through the very heart of the land the United States promised to set aside for the Indians and their children "forever." Indeed, Chief Blackfoot, when addressed by Commissioner Taylor, responded: "The Crows used to own all this Country including all the rivers of the West." Id., at 88. (Emphasis added.) The conclusion is inescapable that the Crow Indians understood that they retained the ownership of at least those rivers within the metes and bounds of the reservation [450 U.S. 544, 579] granted them. This understanding could only have been strengthened by the reference in the 1868 treaty to the mid-channel of the Yellowstone River as part of the boundary of the reservation; the most likely interpretation that the Crow could have placed on that reference is that half the Yellowstone belonged to them, and it is likely that they accordingly deduced that all of the rivers within the boundary of the reservation belonged to them.

In fact, any other conclusion would lead to absurd results. Gold had been discovered in Montana in 1858, and sluicing operations had begun on a stream in western Montana in 1862; hundreds of prospectors were lured there by this news, and some penetrated Crow territory. N. Plummer, Crow Indians 109-110 (1974). As noted, Commissioner Taylor remarked in 1867 that whites were mining in Indian territory, and he specifically indicated that the United States intended to protect the Indians from such intrusions. Yet the result reached by the Court today indicates that Montana or its licensees would have been free to enter upon the Big Horn River for the purpose of removing minerals from its bed or banks; further, in the Court's view, they remain free to do so in the future. The Court's answer to a similar claim made by the State of Oklahoma in Choctaw Nation is fully applicable here: "We do not believe that [the Indians] would have considered that they could have been precluded from exercising these basic ownership rights to the river bed, and we think it very unlikely that the United States intended otherwise." 397 U.S., at 635. [450 U.S. 544, 580]
state claimant placed its principal reliance on this Court's statement in United States v. Holt State Bank, 270 U.S. 49, 55 (1926), that the conveyance of a riverbed "should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." The Court flatly rejected this argument in Choctaw Nation, pointing out that "nothing in the Holt State Bank case or in the policy underlying its rule of construction . . . requires that courts blind themselves to the circumstances of the grant in determining the intent of the grantor." 17397 U.S., at [450 U.S. 544, 581] 634. Since I believe that the Court has so blinded itself today, I respectfully dissent from its holding that the State of Montana has title to the bed of the Big Horn River. 18

[Footnote 1] While the complaint in this case sought to quiet title only to the bed of the Big Horn River, see ante, at 550, n. 1, I think it plain that if the bed of the river was reserved to the Crow Indians before statehood, so also were the banks up to the high-water mark.

[Footnote 2] See 1 App. 39-40 (testimony of Joe Medicine Crow, Tribal Historian). See also id., at 90, 97 (testimony of Henry Old Coyote). Thus, while one historian has stated that "I have never met a reference to eating of fish" by the Crow Indians, R. Lowie, The Crow Indians 72 (1935), it is clear that such references do exist. See 457 F. Supp., at 602. See also n. 7, infra.


[Footnote 5] According to an account published in the Saint Louis Republican, Oct. 26, 1851, Treaty Commissioner Mitchell stated:

"The ears of your Great Father are always open to the complaints of his Red Children. He has heard and is aware that your buffalo and game [450 U.S. 544, 572] are driven off and your grass and timber consumed by the opening of roads and the passing of emigrants through your countries. For these losses he desires to compensate you." Quoted in Crow Tribe of Indians v. United States, 151 Ct. Cl., at 290, 284 F.2d, at 366.

The same concern was expressed in internal communications of the Government. See, e. g., id., at 287-288, 284 F.2d, at 365 (letter of W. Medill, Commissioner of Indian Affairs to the Secretary of the Interior).

[Footnote 6] The 1868 treaty provided that members of the Crow Tribe who commenced farming would be allotted land and given agricultural supplies; it also provided that subsistence rations for a period of four years would be supplied to every Indian who agreed to settle on the reservation. See Arts. VI, VIII, and IX of the treaty, 15 Stat. 650-652.

[Footnote 7] It is significant that in 1873 the United States Commissioners who sought to negotiate a further diminishment of the Crow Reservation were instructed by the very Act of Mar. 3, 1873, ch. 321, 17 Stat. 626, that "if there is upon such reservation a locality where fishing could be valuable to the Indians, [they should] include the same [in the diminished reservation] if practicable . . . ."

That those fishing rights would have been valuable to the Crow Indians is suggested by the statement of Chief Blackfoot at the 1867 Fort Laramie Conference:

"There is plenty of buffalo, deer, elk, and antelope in my country. There is plenty of beaver in all the streams. There is plenty of fish too. I never yet heard of any of the Crow Nation dying of starvation. I know that the game is fast decreasing, and whenever it gets scarce, I will tell my Great Father. That will be time enough to go farming." Proceedings, at 91. (Emphasis added.)
Edwin Thompson Denig, a white fur trader who resided in Crow territory from approximately 1833 until 1856, also remarked:

"Every creek and river teems with beaver, and good fish and fowl can be had at any stream in the proper season." E. Denig, Of the Crow Nation 21 (1980).

[Footnote 8] In Alaska Pacific Fisheries, the United States sued to enjoin a commercial fishing company from maintaining a fish trap in navigable waters off the Annette Islands in Alaska, which had been set aside for the Metlakatla Indians. The lower courts granted the relief sought, and this Court affirmed. The Court noted: "That Congress had power to make the reservation inclusive of the adjacent waters and submerged land as well as the upland needs little more than statement." 248 U.S., at 87. This was because the reservation was a setting aside of public property "for a recognized public purpose - that of safe-guarding and advancing a dependent Indian people dwelling within the United States." Id., at 88. The Court observed that "[t]he Indians naturally looked on the fishing grounds as part of the islands," and it found further support for its conclusion "in the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." Id., at 89.

[Footnote 9] That the Choctaws and Cherokees were forced to leave their original homeland entirely, while the Crow were forced to accept repeated diminishments of their territory, does not distinguish Choctaw Nation from this case; indeed, if anything, that distinction suggests that the Crow Indians would have had an even greater expectancy than did the Choctaws and Cherokees that the rivers encompassed by their reservation would continue to belong to them. The "public purpose" behind the creation of these reservations in each case was the same: "to provide room for the increasing numbers of new settlers who were encroaching upon Indian lands during their westward migrations." Choctaw Nation v. Oklahoma, 397 U.S., at 623. While the Fort Laramie Treaty of 1851 may have been designed primarily to assure safe passage for settlers crossing Indian lands, by 1868 settlers and miners were remaining in Montana. See N. Plummer, Crow Indians 109-114 (1974). Accordingly, whereas the signatory tribes, by Art. 5 of the 1851 treaty, did not "abandon or prejudice any rights or claims they may have to other lands," see 2 Kappler, at 595, by Art. II of the 1868 treaty the Crow Indians "relinquished all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the [reservation] limits aforesaid." 15 Stat. 650.

[Footnote 10] See Crow Tribe of Indians v. United States, 151 Ct. Cl., at 288-291, 284 F.2d, at 365-367; Proceedings, at 86. The Court suggests that the 1851 treaty was simply "a covenant among several tribes which recognized specific boundaries for their respective territories." Ante, at 553. But this interpretation of the treaty consistently has been rejected by the Court of Claims, which has held that the treaty recognized title in the signatory Indian Nations. See Crow Tribe of Indians, 151 Ct. Cl., at 291, 284 F.2d, at 367; Crow Nation v. United States, 81 Ct. Cl., at 271-272; Fort Berthold Indians v. United States, 71 Ct. Cl., 308 (1930). Further, the Court's interpretation is contrary to the analysis of the 1851 treaty made in Shoshone Indians v. United States, 324 U.S. 335, 349 (1945) ("the circumstances surrounding the execution of the Fort Laramie treaty [of 1851] indicate a purpose to recognize the Indian title to the lands described").

In any event, as the Court concedes, ante, at 553, it is beyond dispute that the 1868 treaty set apart a reservation "for the absolute and undisturbed use and occupation" of the Crow Indians. Cf. United States v. Sioux Nation of Indians, 448 U.S., at 374-376 (discussing the similar provisions of the Fort Laramie Treaty of April 29, 1868, 15 Stat. 635, between the United States and the Sioux Nation).

[Footnote 11] As noted above, neither the "special historical origins" of the Choctaw and Cherokee treaties, nor the provisions of those treaties granting Indian lands in fee simple, serve to distinguish this case from Choctaw Nation. Equally unpersuasive is the suggestion that in Choctaw the Court placed "special emphasis on the Government's promise that the reserved lands would never become part of any State." Ante, at 556, n. 5. Rather than placing "special emphasis" on this promise, the Choctaw Court indicated only that the promise reinforced the conclusion that the Court drew from an analysis of the language of conveyance contained in the treaties. 397 U.S., at 635.
In Brewer-Elliott, the United States established a reservation for the Osage Indians that was bounded on one side "by . . . the main channel of the Arkansas river." 260 U.S., at 81. This Court held that the portion of the Arkansas River in question was nonnavigable and that "the title of the Osages as granted certainly included the bed of the river as far as the main channel, because the words of the grant expressly carry the title to that line." Id., at 87. (Emphasis added.) While the Court purported to reserve the question whether vesting ownership of the riverbed in the Osage Indians would have constituted an appropriate "public purpose" within the meaning of Shively v. Bowlby, 152 U.S. 1 (1894), if the stream had been navigable, that question essentially had been resolved four years earlier in Alaska Pacific Fisheries. See n. 8, supra. In any event, Choctaw Nation clearly holds, and the Court concedes, ante, at 556, that the establishment of an Indian reservation can be an "appropriate public purpose" within the meaning of Shively v. Bowlby.

Later events confirm this conclusion. In 1891, the Crow Indians made a further cession of territory. See Act of Mar. 3, 1891, 31, 26 Stat. 1040. This cession was bounded in part by the Big Horn River. Significantly, the Act described the boundary of the cession as the "mid-channel" of the river; that language necessarily indicates that the Crow owned the entire bed of the Big Horn prior to the cession, and that by the Act they were ceding half the bed in the affected stretch of the river, while retaining the other half in that stretch and the whole of the bed in the portion of the river that remained surrounded by their lands.

Counsel for the State of Montana acknowledged at oral argument that the Crow Indians did not understand the meaning of the equal-footing doctrine at the times they entered into the Fort Laramie Treaties. Tr. of Oral Arg. 13-14.

Statements made by Chief Blackfoot during the treaty negotiations of 1873 buttress this conclusion. See, e. g., 3 App. 136 ("The Great Spirit made these mountains and rivers for us, and all this land"); id., at 171 ("On the other side of the river all those streams belong to the Crows").

The Court suggests that the fact the United States retained a navigational easement in the Big Horn River indicates that the 1868 treaty could not have granted the Crow the exclusive right to occupy all the territory within the reservation boundary. Ante, at 555. But the retention of a navigational easement obviously does not preclude a finding that the United States meant to convey the land beneath the navigable water. See, e. g., Choctaw Nation, supra; Alaska Pacific Fisheries, supra.

The Court's reliance on Holt State Bank is misplaced for other reasons as well. At issue in that case was the bed of Mud Lake, a once navigable body of water in the Red Lake Reservation in Minnesota. Prior to the case, most of the reservation, and all the tracts surrounding the lake, had been "relinquished and ceded" by the Indians and sold off to homesteaders. 270 U.S., at 52-53. No such circumstances are present here. See n. 18, infra.

Moreover, a critical distinction between this case and Holt State Bank arises from the questionable status of the Red Lake Reservation before Minnesota became a State. The Court in Holt State Bank concluded that in the treaties preceding statehood there had been, with respect to the Red Lake area - unlike other areas - "no formal setting apart of what was not ceded, nor any affirmative declaration of the rights of the Indians therein . . . ." 270 U.S., at 58 (footnote omitted). Thus, Holt State Bank clearly does not control a case, such as this one, in which, prior to statehood, the United States set apart by formal treaty a reservation that included navigable waters. See n. 10, supra.

Finally, the Court fails to recognize that it is Holt State Bank, not Choctaw Nation, that stands as "a singular exception" to this Court's established line of cases involving claims to submerged lands adjacent to or encompassed by Indian reservations. See Choctaw Nation; Brewer-Elliott; Alaska Pacific Fisheries; Donnelly v. United States, all supra.
[Footnote 18] I agree with the Court's resolution of the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe. I note only that nothing in the Court's disposition of that issue is inconsistent with the conclusion that the bed of the Big Horn River belongs to the Crow Indians. There is no suggestion that any parcels alienated in consequence of the Indian General Allotment Act of 1887, 24 Stat. 388, or the Crow Allotment Act of 1920, 41 Stat. 751, included portions of the bed of the Big Horn River. Further, the situation here is wholly unlike that in Puyallup Tribe v. Washington Game Dept., 433 U.S. 165 (1977). As the Court recognizes, ante, at 561, the Puyallups alienated, in fee simple, the great majority of the lands in the reservation, including all the land abutting the Puyallup River. 433 U.S., at 173-174, and n. 11. This is not such a case. [450 U.S. 544, 582]
The District Court held that applicants' complaint, based on federal common law, stated a claim under 28 U.S.C. 1331. 560 F.Supp. 213, 214-215 (1983). The District Court held that the Tribal Court lacked subject-matter jurisdiction over Sage's claim, because the land upon which the tort had occurred was not Indian land, and the defendants were not tribal members. The District Court relied on our [468 U.S. 1315, 1317] decision in Montana v. United States, 450 U.S. 544, 565-566, 1258-1259 (1981), in reaching this conclusion.

The Tribe appealed to the Court of Appeals for the Ninth Circuit, and that court reversed over a partial dissent. 736 F.2d 1320, 1322 (1984). The Court of Appeals reasoned on the authority of one of its prior decisions that "Indian tribes are not constrained by the provisions of the Fourteenth Amendment." It went on to determine that tribes are bound by the provisions of the Indian Civil Rights Act, 25 U.S.C. 1301 et seq., and that 202(8) of this Act, 25 U.S.C. 1302(8), requires that tribal courts exercise their jurisdiction in a manner consistent with due process and equal protection. But the court then concluded that since Congress had expressly limited federal-court review of a claimed violation of the ICRA to a single remedy-the writ of habeas corpus—there could be no federal-court review of any tribal court exercise of jurisdiction in a civil case. The Court of Appeals for the Ninth Circuit relied in part on our decision in Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66-70, 98 S. Ct. 1670, 1681-1683 (1978), to reach this conclusion. The Court of Appeals recognized that our decision in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), had relied on principles of federal common law to determine whether a tribal court had exceeded its jurisdiction, but decided that our opinion the same Term in Santa Clara Pueblo, supra, suggested a restriction on federal-court review of Indian tribal jurisdiction as a result of the ICRA. The Court of Appeals observed in a footnote that "[i]f Sage seek to enforce his default judgment in the courts of Montana, National may, of course, challenge the tribal court's jurisdiction in the collateral proceedings. See generally Durfee v. Duke, 375 U.S. 106 . . . [.] (1963)." 736 F.2d, at 1324, n. 6.

It is clear from proceedings in this case subsequent to the handing down of the opinion of the Court of Appeals that the respondents in this case have no intention of resorting to any state-court proceedings in order to enforce the judgment of [468 U.S. 1315, 1318] the Crow Tribal Court. After the issuance of the mandate of the Court of Appeals, tribal officials, at the behest of respondent Sage, seized 12 computer terminals, other computer equipment, and a truck from the School District. The basis for this seizure was said to be the Tribal Court judgment, and no state process was invoked.

If the Court of Appeals is correct in the conclusions which it drew in its opinion, the state of the law respecting review of jurisdictional excesses on the part of Indian tribal courts is indeed anomalous. The Court of Appeals may well be correct that tribal courts are not constrained by the Due Process or Equal Protection Clauses of the Fourteenth Amendment; long ago, this Court said in United States v. Kagama, 118 U.S. 375, 379, 1111 (1886), and repeated the statement as recently as Oliphant v. Suquamish Indian Tribe, supra, 435 U.S., at 211:

" 'Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or the States of the Union. There exist in the broad domain of a sovereignty but these two.' "

But if because only the National and State Governments exercise true sovereignty, and are therefore subject to the commands of the Fourteenth Amendment, I cannot believe that Indian tribal courts are nonetheless free to exercise their jurisdiction in a manner prohibited by the decisions of this Court, and that a litigant who is the subject of such an exercise of jurisdiction has nowhere at all to turn for relief from a conceded excess. Every final decision of the highest court of a State in which such a decision may be had is subject to review by this Court on either certiorari or appeal. 28 U.S.C. 1257. Every decision of a United States district court or of a court of appeals is reviewable by this Court either by way of appeal or by certiorari. 1252-1254; cf. 1291. If the courts of the States, which in common with the National Government exercise the only true sovereignty exercised within our Nation, Kagama, supra, are to have [468 U.S. 1315, 1319] their judgments reviewed by this Court on a claim of erroneous decision of a federal question, it is anomalous that no federal court, to say nothing of a state court, may review a judgment of an Indian tribal court which likewise erroneously decides a federal question as to the extent
of its jurisdiction. See Montana v. United States, supra. It may be that Congress could provide for such a result, but I have a good deal more doubt than did the Court of Appeals that it has done so.

Our decision in Santa Clara Pueblo v. Martinez, supra, which the Court of Appeals read to support its conclusion, raised the question of whether a federal court could pass on the validity of an Indian Tribe's ordinance denying membership to the children of certain female tribal members. We held that the ICRA did not imply a private cause of action to redress violations of the statutory Bill of Rights contained in the Act, and that therefore the validity of the tribal ordinance regulating membership could not be reviewed in federal court. It seems to me that this holding, relating as it did to the relationship between the right of a Tribe to regulate its own membership and the claims of those who had been denied membership, is quite distinguishable from a claim on the part of a non-Indian that a tribal court has exceeded the bounds of tribal jurisdiction as enunciated in such decisions of this Court as Montana v. United States, supra. As Justice WHITE pointed out in his dissent in Santa Clara Pueblo v. Martinez, 436 U.S., at 72, "[t]he declared purpose of the Indian Civil Rights Act . . . is 'to insure that the American Indian is afforded the broad constitutional rights secured to other Americans.' " But as the Court also pointed out in its opinion, Congress entertained the additional purpose of promoting "the well-established federal 'policy of furthering Indian self-government.' " Id., at 62. The facts as well as the holding of Santa Clara Pueblo, supra, satisfy me that Congress' concern in enacting the ICRA was to enlarge the rights of individual Indians as against the tribe while not unduly infringing on the right of tribal self-government. The fact that no private civil cause of action is to be implied under the ICRA, Santa Clara Pueblo, supra, does not to my mind foreclose the likelihood that federal jurisdiction may be invoked by one who claims to have suffered from an excess beyond federally prescribed jurisdictional limits of an Indian tribal court on the basis of federal common law. See, e.g., Illinois v. City of Milwaukee, 406 U.S. 91, 99-100, 1390-1391d 712 (1972). We said in Oliphant v. Suquamish Indian Tribe, 435 U.S., at 206-1020:

" 'Indian law' draws principally on the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them."

I think a fair reading of all of our case law on this subject could lead to the conclusion that even though the ICRA affords no private civil cause of action to one claiming a violation of its terms, "Indian law" as of the time that law was enacted afforded a basis for review of tribal-court judgments claimed to be in excess of tribal-court jurisdiction.

Respondents insist that under Rule 44.2 of this Court a supersedeas bond should have accompanied applicants' request for a stay. That Rule provides:

"If the stay is to act as a supersedeas, a supersedeas bond shall accompany the motion and shall have such surety or sureties as said judge, court, or Justice may require."

I do not think that the Rule is by its terms applicable to this case. The term "supersedeas" to me suggests the order of an appellate court having authority to review on direct appeal the judgment which is superseded. All of the pro- [468 U.S. 1315 , 1321]ceedings in the various federal courts in this case have, of course, sought no direct review of the Tribal Court judgment, which simply is not provided for by statute at all, but collateral relief. The District Court did not review the judgment of the Indian Tribal Court by way of appeal, but instead enjoined its enforcement.

It may well be that under the Federal Rules of Civil Procedure respondents would have a plausible argument to make to the District Court that an injunction bond serving somewhat the same purposes as a supersedeas bond should be required by that court so long as its injunction remains in effect. Whether such a bond should be required of either party in this case, and whether in particular it should be required of applicant Lodge Grass School District No. 27 in view of the fact that apparently under Montana law a
The public body is not required to post a supersedeas bond in a state-court proceeding, is an issue best left in the first instance to the District Court.

As to whether, if I am right in thinking that this Court may well decide that tribal-court judgments are subject to federal-court review for claims of jurisdictional excess, applicants would necessarily prevail, I express no opinion. The District Court held in their favor on this point, but the Court of Appeals for the Ninth Circuit found no necessity for reaching it since it held that there was no federal jurisdiction to consider it. The District Court in its opinion quoted F. Cohen, Handbook of Federal Indian Law 253 (1982), to the effect that "the extent of Tribal civil jurisdiction over the non-Indian is not fully determined." 560 F.Supp., at 218. The District Court, in reaching the conclusion it did, relied on the following language from our opinion in United States v. Montana:

“To be sure, Indian Tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” 450 U.S., at 565-566.

The court concluded that exercise of tribal jurisdiction over an injury to a tribal member occurring on non-Indian-owned fee land within the boundaries of the reservation was not within the description of Indian tribal jurisdiction. I express no opinion as to what the correct answer to this inquiry may be. I do think its correct decision is of far less importance than the correct decision of the more fundamental question of whether there is any federal-court review available to non-Indians for excesses of tribal-court jurisdiction.

It is so ordered.

United States Supreme Court

IOWA MUTUAL INS. CO. v. LaPLANTE, (1987)

No. 85-1589

Argued: December 1, 1986     Decided: February 24, 1987

Respondent employee (hereafter respondent) of a ranch located on the Blackfeet Indian Reservation and owned by Indians, brought suit in Blackfeet Tribal Court seeking compensation from the ranch for personal injuries respondent suffered when the cattle truck he was driving "jack-knifed," and seeking compensatory and punitive damages from petitioner, the ranch's insurer, for its alleged bad-faith refusal to settle the personal injury claim. Upon petitioner's motion to dismiss, the Tribal Court held that it had subject-matter jurisdiction, ruling that the Tribe could regulate the conduct of non-Indians engaged in commercial relations with Indians on the reservation. Without seeking review by the Tribal Court of Appeals, petitioner brought an action in Federal District Court, alleging diversity of citizenship as the basis for federal jurisdiction, and seeking a declaration that petitioner had no duty to defend the ranch because respondent's injuries fell outside the applicable insurance policies' coverage. The District Court dismissed the action for lack of subject-matter jurisdiction, and the Federal Court of Appeals affirmed, concluding
that the Tribal Court system should be permitted to initially determine its own jurisdiction, which
determination could be reviewed later in federal court.

Held:

1. A federal district court may not exercise diversity jurisdiction over a dispute before an
appropriate Indian tribal court system has first had an opportunity to determine its own
   (a) The rule announced in National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845,
requiring exhaustion of tribal remedies, applies here even though National Farmers Union was a
federal-question case rather than a diversity case. Regardless of the basis for jurisdiction, federal
policy supporting tribal self-government requires federal courts, as a matter of comity, to stay their
hands in order to give tribal courts a full opportunity to first determine their own jurisdiction. Pp.
15-16.
   (b) At a minimum, the requirement of exhaustion of tribal remedies means that tribal appellate
courts must have the opportunity to review lower tribal court determinations. Here, since
petitioner did not obtain appellate review of the Tribal Court's initial determination that it had [480
U.S. 9, 10] jurisdiction, the National Farmers Union rule has not been satisfied and federal
courts should not intervene. Pp. 16-17.
   (c) Nothing in the diversity statute (28 U.S.C. 1332) or its legislative history suggests a
congressional intent to override the federal policy of deference to tribal courts, and, in the
absence of any indication of such an intent, civil jurisdiction over the activities of non-Indians on
   (d) Petitioner's contention that local bias and incompetence on the part of tribal courts justify the
exercise of federal jurisdiction is without merit since incompetence is not among National Farmers
Union's exceptions to the exhaustion requirement and would be contrary to the congressional
policy promoting tribal courts' development, and since the Indian Civil Rights Act, 25 U.S.C. 1302,
2. Although a final determination of jurisdiction by the Blackfeet Tribal Courts will be subject to
review in federal court, relitigation of any Tribal Court resolution of respondent's bad-faith claim
will be precluded by the proper deference owed the tribal court system, unless a federal court
determines that the Tribal Court, in fact, lacked jurisdiction. P. 19.
3. The Federal Court of Appeals erred in affirming the District Court's dismissal of petitioner's suit
for lack of subject-matter jurisdiction, and, on remand, the District Court should consider whether
that suit should be stayed pending further tribal court proceedings or dismissed under National

774 F.2d 1174, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE,
BLACKMUN, POWELL, O'CONNOR, and SCALIA, JJ., joined. STEVENS, J., filed an opinion concurring
in part and dissenting in part, post, p. 20.

Maxon R. Davis argued the cause and filed briefs for petitioner.

Joe Bottomly argued the cause and filed a brief for respondents.

[ Footnote * ] Briefs of amici curiae urging affirmance were filed for the United States by Solicitor General
Fried, Assistant Attorney General Habicht, Deputy Solicitor General Wallace, Richard G. Taranto, and
Edward J. Shawaker; for the Blackfeet Tribe of Indians by Jeanne S. Whiteing; and for the Navajo Nation
Tribe of Indians et al. by Claudeen Bates Arthur, Yvonne T. Knight, and W. Richard West, Jr. [480 U.S. 9,
11]

JUSTICE MARSHALL delivered the opinion of the Court.
Petitioner, an Iowa insurance company, brought this action in Federal District Court against members of the Blackfeet Indian Tribe resident on the Tribe’s reservation in Montana. The asserted basis for federal jurisdiction was diversity of citizenship. At the time the action was initiated, proceedings involving the same parties and based on the same dispute were pending before the Blackfeet Tribal Court. The question before us is whether a federal court may exercise diversity jurisdiction before the tribal court system has an opportunity to determine its own jurisdiction.

Respondent Edward LaPlante, a member of the Blackfeet Indian Tribe, was employed by the Wellman Ranch Company, a Montana corporation. The Wellman Ranch is located on the Blackfeet Indian Reservation and is owned by members of the Wellman family, who are also Blackfeet Indians residing on the Reservation. Petitioner Iowa Mutual Insurance Company was the insurer of the Wellman Ranch and its individual owners.

On May 3, 1982, LaPlante was driving a cattle truck within the boundaries of the Reservation. While proceeding up a hill, he lost control of the vehicle and was injured when the truck "jackknifed." Agents of Midland Claims Service, Inc., an independent insurance adjuster which represented Iowa Mutual in this matter, attempted unsuccessfully to settle LaPlante’s claim. In May 1983, LaPlante and his wife Verla, also a Blackfeet Indian, filed a complaint in the Blackfeet Tribal Court. The complaint stated two causes of action: the first named the Wellman Ranch and its individual owners as defendants and sought compensation for LaPlante’s personal injuries and his wife’s loss of consortium; the second alleged a claim for compensatory and punitive damages against Iowa Mutual and Midland Claims for bad-faith refusal to settle.

Iowa Mutual and Midland Claims moved to dismiss for failure properly to allege Tribal Court jurisdiction and for lack of jurisdiction over the subject matter of the suit. The Tribal Court dismissed the complaint for failure to allege the factual basis of the court’s jurisdiction, but it allowed the LaPlantes to amend their complaint to allege facts from which jurisdiction could be determined. The Tribal Court also addressed the issue of subject-matter jurisdiction, holding that the Tribe could regulate the conduct of non-Indians engaged in commercial relations with Indians on the reservation. Since the Tribe’s adjudicative jurisdiction was coextensive with its legislative jurisdiction, the court concluded that it would have jurisdiction over the suit. Although the Blackfeet Tribal Code establishes a Court of Appeals, see ch. 11, 1, it does not allow interlocutory appeals from jurisdictional rulings. Accordingly, appellate review of the Tribal Court’s jurisdiction can occur only after a decision on the merits.

Subsequent to the Tribal Court’s jurisdictional ruling, Iowa Mutual filed the instant action in Federal District Court against the LaPlantes, the Wellmans, and the Wellman Ranch Company, alleging diversity of citizenship under 28 U.S.C. 1332 as the basis for federal jurisdiction. Iowa Mutual sought a declaration that it had no duty to defend or indemnify the Wellmans or the Ranch because the injuries sustained by the LaPlantes fell outside the coverage of the applicable insurance policies. The LaPlantes moved to dismiss the action for lack of subject-matter jurisdiction and the District Court granted the motion. Relying on R. J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979 (CA9 1983), the court held that the Blackfeet Tribal Court must first be given an opportunity to determine its own jurisdiction. The District Court noted that the Montana state courts lack jurisdiction over comparable suits filed by Montana insurance companies; it indicated that its jurisdiction was similarly precluded because, based on its reading of Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949), federal courts sitting in diversity operate solely as adjuncts to the state court system. The District Court held that “[o]nly if the Blackfeet Tribe decides not to exercise its exclusive jurisdiction . . . would this court be free to entertain” the case under 28 U.S.C. 1332.

The Court of Appeals for the Ninth Circuit affirmed the District Court’s order. 774 F.2d 1174 (1985). It found R. J. Williams Co. v. Fort Belknap Housing Authority, supra, to be consistent with this Court’s intervening decision in National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985). Quoting id., at 857, the Court of Appeals concluded: “We merely permit the tribal court to initially
determine its own jurisdiction. The tribal court's determination can be reviewed later `with the benefit of [tribal court] expertise in such matters.'” App. to Pet. for Cert. 5a-6a. We granted certiorari. 476 U.S. 1139 (1986).

II

We have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government. See, e. g., Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877, 890 (1986); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 138, n. 5 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-144, and n. 10 (1980); Williams v. Lee, 358 U.S. 217, 220-221 (1959). This policy reflects the fact that Indian tribes retain "attributes of sovereignty over both their members and their territory," United States v. Mazurie, 419 U.S. 544, 557 (1975), to the extent that sovereignty has not been withdrawn by federal statute or treaty. The federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively pre-empted by federal statute. "[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." Williams v. Lee, supra, at 220.

Tribal courts play a vital role in tribal self-government, cf. United States v. Wheeler, 435 U.S. 313, 332 (1978), and the Federal Government has consistently encouraged their development. Although the criminal jurisdiction of the tribal courts is subject to substantial federal limitation, see Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), their civil jurisdiction is not similarly restricted. See National Farmers Union, supra, at 854-855, and nn. 16 and 17. If state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law. See Fisher v. District Court, 424 U.S. 382 (1976); Williams v. Lee, supra.

A federal court's exercise of jurisdiction over matters relating to reservation affairs can also impair the authority of tribal courts, as we recognized in National Farmers Union. In that case, a Tribal Court had entered a default judgment against a school district for injuries suffered by an Indian child on school property. The school district and its insurer sought injunctive relief in District Court, invoking 28 U.S.C. 1331 as the basis for federal jurisdiction and claiming that the Tribal Court lacked jurisdiction over non-Indians. The District Court agreed and entered an injunction against execution of the Tribal Court's judgment, but the Court of Appeals reversed, holding that the District Court lacked jurisdiction. We refused to foreclose tribal court jurisdiction over a civil dispute involving a non-Indian. 471 U.S., at 855. We concluded that, although the existence of tribal court jurisdiction presented a federal question within the scope of 28 U.S.C. 1331, considerations of comity direct that tribal remedies be exhausted before the question is addressed by the District Court. 471 U.S., at 857. Promotion of tribal self-government and self-determination required that the Tribal Court have "the first opportunity to evaluate the factual and legal bases for the challenge" to its jurisdiction. Id., at 856. We remanded the case to the District Court to determine whether the federal action should be dismissed or stayed pending exhaustion of the remedies available in the tribal court system. 8 Id., at 857.

Although petitioner alleges that federal jurisdiction in this case is based on diversity of citizenship, rather than the existence of a federal question, the exhaustion rule announced in National Farmers Union applies here as well. Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a "full opportunity to determine its own jurisdiction." Ibid. In diversity cases, as well as federal-question cases, unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978); see also Fisher v. District Court, supra, at 388. Adjudication of such matters by any nontribal court also infringes upon tribal lawmaking authority, because tribal courts are best qualified to interpret and apply tribal law.

As National Farmers Union indicates, proper respect for tribal legal institutions requires that they be given a "full opportunity to consider the issues before them and "to rectify any errors." 471 U.S., at 857. The
federal policy of promoting tribal self-government encompasses the development [480 U.S. 9, 17] of the entire tribal court system, including appellate courts. At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts. In this case, the Tribal Court has made an initial determination that it has jurisdiction over the insurance dispute, but Iowa Mutual has not yet obtained appellate review, as provided by the Tribal Code, ch. 1. 5. Until appellate review is complete, the Blackfeet Tribal Courts have not had a full opportunity to evaluate the claim and federal courts should not intervene.

Petitioner argues that the statutory grant of diversity jurisdiction overrides the federal policy of deference to tribal courts. We do not agree. Although Congress undoubtedly has the power to limit tribal court jurisdiction, 9 we do not read the general grant of diversity jurisdiction to have implemented such a significant intrusion on tribal sovereignty, any more than we view the grant of federal-question jurisdiction, the statutory basis for the intrusion on tribal jurisdiction at issue in National Farmers Union, to have done so. The diversity statute, 28 U.S.C. 1332, makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established federal policy promoting tribal self-government. Tribal courts in the Anglo-American mold were virtually unknown in 1789 when Congress first authorized diversity jurisdiction, see Judiciary Act of 1789, 11, 1 Stat. 78-79; and the original statute did not manifest a congressional intent to limit tribal sovereignty. Moreover, until the late 19th century, most Indians were neither considered citizens of the States in which their reservation was located, nor regarded as citizens of a foreign State, see, e. g., Cherokee Nation v. Georgia, 5 Pet. 1, 15-18 (1831); Elk v. Wilkins, 112 U.S. 94, 102 -103 (1884), so a suit to which Indians were parties would not have satisfied [480 U.S. 9, 18] the statutory requirements for diversity jurisdiction. 10 Congress has amended the diversity statute several times since the development of tribal judicial systems, 11 but it has never expressed any intent to limit the civil jurisdiction of the tribal courts.

Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. See Montana v. United States, 450 U.S. 544, 565 -566 (1981); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 152 -153 (1980); Fisher v. District Court, 424 U.S., at 387 -389. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." Merrion v. Jicarilla Apache Tribe, 455 U.S., at 149 , n. 14. See also Santa Clara Pueblo v. Martinez, supra, at 60 ("[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent"). In the absence of any indication that Congress intended the diversity statute to limit the jurisdiction of the tribal courts, we decline petitioner's invitation to hold that tribal sovereignty can be impaired in this fashion.

Petitioner also contests that the policies underlying the grant of diversity jurisdiction - protection against local bias and incompetence - justify the exercise of federal jurisdiction [480 U.S. 9, 19] in this case. We have rejected similar attacks on tribal court jurisdiction in the past. See, e. g., Santa Clara Pueblo v. Martinez, 436 U.S., at 65 , and n. 21. The alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement established in National Farmers Union, 471 U.S., at 856 , n. 21, 12 and would be contrary to the congressional policy promoting the development of tribal courts. Moreover, the Indian Civil Rights Act, 25 U.S.C. 1302, provides non-Indians with various protections against unfair treatment in the tribal courts.

Although petitioner must exhaust available tribal remedies before instituting suit in federal court, the Blackfeet Tribal Courts' determination of tribal jurisdiction is ultimately subject to review. If the Tribal Appeals Court upholds the lower court's determination that the tribal courts have jurisdiction, petitioner may challenge that ruling in the District Court. See National Farmers Union, supra, at 853. Unless a federal court determines that the Tribal Court lacked jurisdiction, however, proper deference to the tribal court system precludes relitigation of issues raised by the LaPlantes' bad-faith claim and resolved in the Tribal Courts.
The Court of Appeals correctly recognized that National Farmers Union requires that the issue of jurisdiction be resolved by the Tribal Courts in the first instance. However, the court should not have affirmed the District Court's dismissal [480 U.S. 9, 20] for lack of subject-matter jurisdiction. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

It is so ordered.

Footnotes

[Footnote 1] Iowa Mutual and Midland Claims renewed their motions to dismiss for lack of subject-matter jurisdiction after the LaPlantes amended their complaint to set forth the factual bases for the Tribal Court's jurisdiction. The Tribal Court summarily denied the motions. Brief for United States as Amicus Curiae 3-4.

[Footnote 2] Midland Claims also initiated a federal action against the LaPlantes in which Iowa Mutual intervened as a plaintiff. The companies sought a declaratory judgment that the Tribal Court lacked jurisdiction over the LaPlantes' claim of bad-faith refusal to settle, as well as an injunction barring further proceedings in the Tribal Courts. The jurisdictional basis for this suit was 28 U.S.C. 1331. The District Court dismissed this suit for failure to state a claim and both companies appealed. While the appeal was pending, this Court decided National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985). The Court of Appeals for the Ninth Circuit remanded the action to the District Court for reconsideration in light of National Farmers Union. On remand, the District Court dismissed the action without prejudice, pending exhaustion of tribal court remedies. That decision is not before us.

[Footnote 3] Iowa Mutual also asserted lack of coverage as an affirmative defense in its answer to respondents' amended Tribal Court complaint. See Reply Brief for Petitioner 1, n. 1.

[Footnote 4] A federal statute, Pub. L. 280, originally allowed States to assume civil jurisdiction over reservation Indians without tribal consent, but Montana did not take such action with respect to the Blackfeet Tribe. See Kennerly v. District Court, 400 U.S. 423 (1971). Tribal consent is now a prerequisite to the assumption of jurisdiction, see 25 U.S.C. 1326, and the Blackfeet Tribe has not consented to state jurisdiction. Petitioner does not contend that the Montana state courts would have jurisdiction over the dispute. Brief for Petitioner 5 and 7; see Milbank Mutual Ins. Co. v. Eagleman, 218 Mont. 35, 705 P.2d 1117 (1985) (Montana state courts lack subject-matter jurisdiction over suit between Indian and non-Indian arising out of on-reservation conduct).


[Footnote 6] For example, Title II of the Indian Civil Rights Act provides "for the establishing of educational classes for the training of judges of courts of Indian offenses." 25 U.S.C. 1311(4).


[Footnote 8] As the Court's directions on remand in National Farmers Union indicate, the exhaustion rule enunciated in National Farmers Union did not deprive the federal courts of subject-matter jurisdiction. Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite. In this respect, the rule is analogous to principles of abstention articulated in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976): even where there is concurrent jurisdiction in both the state and federal courts, deference to state proceedings renders it appropriate for the federal courts to decline jurisdiction.
in certain circumstances. In Colorado River, as here, strong federal policy concerns favored resolution in the nonfederal forum. See id., at 819.


[Footnote 10] In 1924, Congress declared that all Indians born in the United States are United States citizens, see Act of June 2, 1924, ch. 233, 43 Stat. 253, now codified at 8 U.S.C. 1401, and, therefore, under the Fourteenth Amendment, Indians are citizens of the States in which they reside. There is no indication that this grant of citizenship was intended to affect federal protection of tribal self-government.


[Footnote 12] In National Farmers Union, we indicated that exhaustion would not be required where "an assertion of tribal jurisdiction `is motivated by a desire to harass or is conducted in bad faith,' or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of adequate opportunity to challenge the court's jurisdiction." 471 U.S., at 856, n. 21 (citation omitted). While petitioner contends that tribal court jurisdiction over outsiders "is questionable at best," Reply Brief for Petitioner 6, it does not argue that the present action is "patently violative of express jurisdictional prohibitions," nor do we understand it to invoke any of the other exceptions enumerated in National Farmers Union.

[Footnote 13] See n. 8, supra.

The Court of Appeals also relied on Woods v. Interstate Realty Co., 337 U.S. 535 (CA9 1949), as a basis for dismissal. Following its earlier decision in R. J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979, 982 (1983), the court held that diversity jurisdiction would be barred as long as the courts of the State in which the federal court sits would not entertain the suit, apparently assuming that the exercise of federal jurisdiction would contravene a substantive state policy. However, it is not clear that Montana has such a policy, since state-court jurisdiction seems to be precluded by the application of the federal substantive policy of non-infringement, rather than any state substantive policy. See, e. g., Milbank Mutual Ins. Co. v. Eagleman, 218 Mont. 35, 705 P.2d 1117 (1985).

[Footnote 14] On remand, the District Court should consider whether, on the facts of this case, the federal action should be stayed pending further Tribal Court proceedings or dismissed under the prudential rule announced in National Farmers Union.

JUSTICE STEVENS, concurring in part and dissenting in part.

The complaint filed by petitioner in the United States District Court for the District of Montana raised questions concerning the coverage of the insurance policy that petitioner had issued to respondents Wellman Ranch Co. and its owners. Complaint §§ 8, 9 (App. 3-4). It did not raise any question concerning the jurisdiction of the Blackfeet Tribal Court. For purposes of our decision, it is therefore appropriate to assume that the Tribal Court and the Federal District Court had concurrent jurisdiction over the dispute. The question presented is whether the Tribal Court's jurisdiction is a sufficient reason for requiring the federal court to decline to exercise its own jurisdiction until the Tribal Court has decided the case on the merits. In my opinion it is not. [480 U.S. 9, 21]

A federal court must always show respect for the jurisdiction of other tribunals. Specifically, only in the most extraordinary circumstances should a federal court enjoin the conduct of litigation in a state court or a tribal court. Thus, in National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985), we held that the Federal District Court should not entertain a challenge to the jurisdiction of the Crow Tribal Court until
after petitioner had exhausted its remedies in the Tribal Court. Our holding was based on our belief that Congress’ policy of supporting tribal self-determination “favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge.” Id., at 856 (emphasis added; footnote omitted). We have enforced a similar exhaustion requirement in cases challenging the jurisdiction of state tribunals. See, e. g., Juidice v. Vail, 430 U.S. 327, 335-336 (1977).

The deference given to the deliberations of tribal courts on the merits of a dispute, however, is a separate matter as to which National Farmers Union offers no controlling precedent. Indeed, in holding that exhaustion of the tribal jurisdictional issue was necessary, we explicitly contemplated later federal-court consideration of the merits of the dispute. We noted that “the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.” 471 U.S., at 856 (footnote omitted). I see no reason why tribal courts should receive more deference on the merits than state courts. It is not unusual for a state court and a federal court to have concurrent jurisdiction over the same dispute. In some such cases it is appropriate for the federal court to stay its hand until the state-court litigation has terminated, see, e. g., Colorado River Water Conservation District v. United States, 424 U.S. 800, 813-816 (1976), but as we have consistently held, “[a]bstention from the exercise of federal jurisdiction is the exception, not the rule.” Id., at 813. The mere fact that a case involving the same issue is pending in another court has never been considered a sufficient reason to excuse a federal court from performing its duty “to adjudicate a controversy properly before it.” County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188 (1959). On the contrary, as between state and federal courts, the general rule is that “the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction . . . .” McClellan v. Carland, 217 U.S. 268, 282 (1910). In this case a controversy concerning the coverage of the insurance policy issued to respondents Wellman Ranch Co. and its owners by petitioner is properly before the Federal District Court.

That controversy raises no question concerning the jurisdiction of the Blackfeet Tribal Court.

Adherence to this doctrine, by allowing the declaratory judgment action to proceed in District Court, would imply no disrespect for the Blackfeet Tribe or for its judiciary. It would merely avoid what I regard as the anomalous suggestion that the sovereignty of an Indian tribe is in some respects greater than that of the State of Montana, for example.

Until today, we have never suggested that an Indian tribe’s judicial system is entitled to a greater degree of deference than the judicial system of a sovereign State. Today’s opinion, however, requires the federal court to avoid adjudicating the merits of a controversy also pending in tribal court although it could reach those merits if the case instead were pending in state court. Thus, although I of course agree with the Court’s conclusion that the Federal District Court had subject-matter jurisdiction over the case, I respectfully dissent from its exhaustion holding.

[Footnote *] The Court seems to assume that the merits of this controversy are governed by “tribal law.” See ante, at 16. I express no opinion on this choice-of-law question. [480 U.S. 9, 23]

No. 95-1872


Vehicles driven by petitioner Fredericks and respondent Stockert collided on a portion of a North Dakota state highway that runs through the Fort Berthold Indian Reservation. The 6.59 mile stretch of highway within the reservation is open to the public, affords access to a federal water resource project, and is maintained by North Dakota under a federally granted right of way that lies on land held by the United States in trust for the Three Affiliated Tribes and their members. Neither driver is a member of the Tribes or an Indian, but Fredericks is the widow of a deceased tribal member and has five adult children who are also members. The truck driven by Stockert belonged to his employer, respondent A-1 Contractors, a non Indian owned enterprise with its principal place of business outside the reservation. At the time, A-1 was under a subcontract with LCM Corporation, a corporation wholly owned by the Tribes, to do landscaping within the reservation. The record does not show whether Stockert was engaged in subcontract work at the time of the accident. Fredericks filed a personal injury action in Tribal Court against Stockert and A-1, and Fredericks' adult children filed a loss of consortium claim in the same lawsuit. The Tribal Court ruled that it had jurisdiction over Fredericks' claim and therefore denied respondents' motion to dismiss, and the Northern Plains Intertribal Court of Appeals affirmed. Respondents then commenced this action in the Federal District Court against Fredericks, her adult children, the Tribal Court, and Tribal Judge Strate, seeking a declaratory judgment that, as a matter of federal law, the Tribal Court lacked jurisdiction to adjudicate Fredericks' claims; respondents also sought an injunction against further Tribal Court proceedings. Relying particularly on National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, and Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, the District Court dismissed the action, determining that the Tribal Court had civil jurisdiction over Fredericks' claim and therefore denied respondents' motion to dismiss, and the Northern Plains Intertribal Court of Appeals affirmed. Respondents then commenced this action in the Federal District Court against Fredericks, her adult children, the Tribal Court, and Tribal Judge Strate, seeking a declaratory judgment that, as a matter of federal law, the Tribal Court lacked jurisdiction to adjudicate Fredericks' claims; respondents also sought an injunction against further Tribal Court proceedings. Relying particularly on National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, and Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, the District Court dismissed the action, determining that the Tribal Court had civil jurisdiction over Fredericks' claim and therefore denied respondents' motion to dismiss, and the Northern Plains Intertribal Court of Appeals affirmed. Respondents then commenced this action in the Federal District Court against Fredericks, her adult children, the Tribal Court, and Tribal Judge Strate, seeking a declaratory judgment that, as a matter of federal law, the Tribal Court lacked jurisdiction to adjudicate Fredericks' claims; respondents also sought an injunction against further Tribal Court proceedings.

Held: When an accident occurs on a public highway maintained by the State pursuant to a federally granted right of way over Indian reservation land, a civil action against allegedly negligent nonmembers falls within state or federal regulatory and adjudicatory governance; absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers driving on the State's highway, tribal courts may not exercise jurisdiction in such cases. This Court expresses no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation. Pp. 4-20.

(a) Absent express authorization by federal statute or treaty, tribal jurisdiction over nonmembers' conduct exists only in limited circumstances. In Oliphant v. Suquamish Tribe, 435 U.S. 191, the Court held that tribes lack criminal jurisdiction over non Indians. Later, in Montana v. United States, the Court set forth the general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non Indian land within a reservation, subject to exceptions relating to (1) the activities of nonmembers who enter consensual relationships with the tribe or its members and (2) nonmember conduct that threatens or directly affects the tribe's political integrity, economic security, health, or welfare. 450 U.S., at 564-567. Pp. 4-7.

(b) Montana controls this case. Contrary to petitioners' contention, National Farmers and Iowa Mutual do not establish a rule converse to Montana's. Neither case establishes that tribes presumptively retain adjudicatory authority over claims against nonmembers arising from occurrences anywhere within a reservation. Rather, these cases prescribe a prudential, nonjurisdictional exhaustion rule requiring a federal court in which tribal court jurisdiction is challenged to stay its hand, as a matter of comity, until after the tribal court has had an initial and full opportunity to determine its own jurisdiction. See 471 U.S., at 857; 480 U.S., at 20, n. 14; see also id., at 16, n. 8. This exhaustion rule, as explained in National Farmers, 47 U.S., at 855-856, reflects the more extensive jurisdictional reach of federal courts in civil cases than in criminal proceedings and the corresponding need to inspect relevant statutes, treaties, and other jurisdictional rules.
materials in order to determine tribal adjudicatory authority. National Farmers' exhaustion requirement does not conflict with Montana, in which the Court made plain that the general rule and exceptions there announced govern only in the absence of a delegation of tribal authority by treaty or statute. See 450 U.S., at 557-563. Read in context, the Court's statement in Iowa Mutual, 480 U.S., at 18, that "[c]ivil jurisdiction over [the] activities of non-Indians on reservation lands" presumptively lies in the tribal courts," addresses only situations in which tribes possess authority to regulate nonmembers' activities. As to nonmembers, a tribe's adjudicatory jurisdiction does not exceed its legislative jurisdiction, absent congressional direction enlarging tribal court jurisdiction. Pp. 7-13.

(c) It is unavailing to argue, as petitioners do, that Montana does not govern this case because the land underlying the accident scene is held in trust for the Three Affiliated Tribes and their members. Petitioners are correct that Montana and the cases following its instruction--Brendale v. Confederated Tribes and Bands of Yakima Nation, 492 U.S. 408, and South Dakota v. Bourland, 508 U.S. 679--all involved alienated, non Indian owned reservation land. However, the right of way North Dakota acquired for its highway renders the 6.59 mile stretch here at issue equivalent, for nonmember governance purposes, to such alienated, non Indian land. The right of way was granted to facilitate public access to a federal water resource project, forms part of the State's highway, and is open to the public. Traffic on the highway is subject to the State's control. The granting instrument details only one specific reservation to Indian landowners, the right to construct necessary crossings, and the Tribes expressly reserved no other right to exercise dominion or control over the right of way. Rather, they have consented to, and received payment for, the State's use of the stretch at issue, and so long as that stretch is maintained as part of the State's highway, they cannot assert a landowner's right to occupy and exclude. Pp. 13-16.

(d) Petitioners refer to no treaty or federal statute authorizing the Three Affiliated Tribes to entertain highway accident tort suits of the kind Fredericks commenced against A-1 and Stockert. Nor have they shown that Fredericks' tribal court action qualifies under either of the exceptions to Montana's general rule. The tortious conduct alleged by Fredericks does not fit within the first exception for "activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," 450 U.S., at 565, particularly when measured against the conduct at issue in the cases cited by Montana, id., at 565-566, as fitting within the exception, Williams v. Lee, 358 U.S. 217, 223; Morris v. Hitchcock, 194 U.S. 384; Buster v. Wright, 135 F. 947, 950; and Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 152-154. This dispute is distinctly nontribal in nature, arising between two non Indians involved in a run of the mill highway accident. Although A-1 was engaged in subcontract work on the reservation, and therefore had a "consensual relationship" with the Tribes, Fredericks was not a party to the subcontract, and the Tribes were strangers to the accident. Montana's second exception, concerning conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe," 450 U.S., at 566, is also inapplicable. The cases cited by Montana as stating this exception each raised the question whether a State's (or Territory's) exercise of authority would trench unduly on tribal self government. Fisher v. District Court of Sixteenth Judicial Dist. of Mont., 424 U.S. 382, 386; Williams, 358 U.S., at 220; Montana Catholic Missions v. Missoula County, 200 U.S. 118, 128-129; and Thomas v. Gay, 169 U.S. 264, 273. Opening the Tribal Court for Fredericks' optional use is not necessary to protect tribal self government; and requiring A-1 and Stockert to defend against this commonplace state highway accident claim in an unfamiliar court is not crucial to the Tribes' political integrity, economic security, or health or welfare. Pp. 16-20.

76 F. 3d 930, affirmed.

Ginsburg, J., delivered the opinion for a unanimous Court.
SUPREME COURT OF THE UNITED STATES
PLAINS COMMERCE BANK v. LONG FAMILY LAND & CATTLE CO., INC., et al.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT


Petitioner Plains Commerce Bank (Bank), a non-Indian bank, sold land it owned in fee simple on a tribal reservation to non-Indians. Respondents the Longs, an Indian couple who had been leasing the land with an option to purchase, claim the Bank discriminated against them by selling the parcel to nonmembers of the Tribe on terms more favorable than the Bank offered to sell it to them. The couple sued in Tribal Court, asserting, *inter alia*, discrimination, breach-of-contract, and bad-faith claims. Over the Bank’s objection, the Tribal Court concluded that it had jurisdiction and proceeded to trial, where a jury ruled against the Bank on three claims, including the discrimination claim. The court awarded the Longs damages plus interest. In a supplemental judgment, the court also gave the Longs an option to purchase that portion of the fee land they still occupied, nullifying the Bank’s sale of the land to non-Indians. After the Tribal Court of Appeals affirmed, the Bank filed suit in Federal District Court, contending that the tribal judgment was null and void because, as relevant here, the Tribal Court lacked jurisdiction over the Longs’ discrimination claim. The District Court granted the Longs summary judgment, finding tribal court jurisdiction proper because the Bank’s consensual relationship with the Longs and their company (also a respondent here) brought the Bank within the first category of tribal civil jurisdiction over nonmembers outlined in *Montana v. United States*, 450 U. S. 544. The Eighth Circuit affirmed, concluding that the Tribe had authority to regulate the business conduct of persons voluntarily dealing with tribal members, including a nonmember’s sale of fee land.

Held:

1. The Bank has Article III standing to pursue this challenge. Both with respect to damages and the option to purchase, the Bank was “injured in fact,” see *Lujan v. Defenders of Wildlife*, 504 U. S. 555, by the Tribal Court’s exercise of jurisdiction over the discrimination claim. This Court is unpersuaded by the Longs’ claim that the damages award was premised entirely on their breach-of-contract verdict, which the Bank has not challenged, rather than on their discrimination claim. Because the verdict form allowed the jury to make a damages award after finding liability as to *any* of the individual claims, the jury could have based its damages award, in whole or in part, on the discrimination finding. The Bank was also injured by the option to purchase. Only the
Longs’ discrimination claim sought deed to the land as relief. The fact that the remedial purchase option applied only to a portion of the total parcel does not eliminate the injury to the Bank, which had no obligation to sell any of the land to the Longs before the Tribal Court’s judgment. That judgment effectively nullified a portion of the sale to a third party. These injuries can be remedied by a ruling that the Tribal Court lacked jurisdiction and that its judgment on the discrimination claim is null and void. Pp. 5-8.

2. The Tribal Court did not have jurisdiction to adjudicate a discrimination claim concerning the non-Indian Bank’s sale of its fee land. Pp. 8-24.

(a) The general rule that tribes do not possess authority over non-Indians who come within their borders, *Montana v. United States*, 450 U. S. 564, restricts tribal authority over nonmember activities taking place on the reservation, and is particularly strong when the nonmember’s activity occurs on land owned in fee simple by non-Indians, *Strate v. A-1 Contractors*, 520 U. S. 438. Once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it. See *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251. Moreover, when the tribe or its members convey fee land to third parties, the tribe “loses any former right of absolute and exclusive use and occupation of the conveyed lands.” *South Dakota v. Bourland*, 508 U. S. 679. Thus, “the tribe has no authority itself ... to regulate the use of fee land.” *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U. S. 408. *Montana* provides two exceptions under which tribes may exercise “civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands,” 450 U. S., at 565: (1) “A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements,” *ibid.*; and (2) a tribe may exercise “civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe,” *ibid.*, at 566. Neither exception authorizes tribal courts to exercise jurisdiction over the Longs’ discrimination claim. Pp. 8-11.

(b) The Tribal Court lacks jurisdiction to hear that claim because the Tribe lacks the civil authority to regulate the Bank’s sale of its fee land, and “a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction,” *Strate*, *supra*, at 453. *Montana* does not permit tribes to regulate the sale of non-Indian fee land. Rather, it permits tribal regulation of nonmember conduct inside the reservation that implicates the tribe’s sovereign interests. 450 U. S., at 564-565. With only one exception, see *Brendale, supra*, this Court has never “upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land,” *Nevada v. Hicks*, 533 U. S. 353. Nor has the Court found that *Montana* authorized a tribe to regulate the sale of such land. This makes good sense, given the limited nature of tribal sovereignty and the liberty interests of nonmembers. Tribal sovereign interests are confined to managing tribal land, see *Worcester v. Georgia*, 6 Pet. 515, 561, protecting tribal self-government, and controlling internal
relations, see Montana, supra, at 564. Regulations approved under Montana all flow from these limited interests. See, e.g., Duro v. Reina, 495 U. S. 676. None of these interests justified tribal regulation of a nonmember’s sale of fee land. The Tribe cannot justify regulation of the sale of non-Indian fee land by reference to its power to superintend tribal land because non-Indian fee parcels have ceased to be tribal land. Nor can regulation of fee land sales be justified by the Tribe’s interest in protecting internal relations and self-government. Any direct harm sustained because of a fee land sale is sustained at the point the land passes from Indian to non-Indian hands. Resale, by itself, causes no additional damage. Regulating fee land sales also runs the risk of subjecting nonmembers to tribal regulatory authority without their consent. Because the Bill of Rights does not apply to tribes and because nonmembers have no say in the laws and regulations governing tribal territory, tribal laws and regulations may be applied only to nonmembers who have consented to tribal authority, expressly or by action. Even then the regulation must stem from the tribe’s inherent sovereign authority to set conditions on entry, preserve self-government, or control internal relations. There is no reason the Bank should have anticipated that its general business dealings with the Longs would permit the Tribe to regulate the Bank’s sale of land it owned in fee simple. The Longs’ attempt to salvage their position by arguing that the discrimination claim should be read to challenge the Bank’s whole course of commercial dealings with them is unavailing. Their breach-of-contract and bad-faith claims involve the Bank’s general dealings; the discrimination claim does not. The discrimination claim is tied specifically to the fee land sale. And only the discrimination claim is before the Court. Pp. 11–22.

(c) Because the second Montana exception stems from the same sovereign interests giving rise to the first, it is also inapplicable here. The “conduct” covered by that exception must do more than injure a tribe; it must “imperil the subsistence” of the tribal community. Montana, 450 U. S., at 566. The land at issue has been owned by a non-Indian party for at least 50 years. Its resale to another non-Indian hardly “imperil[s] the subsistence or welfare of the tribe.” Ibid. Pp. 22–23.

(d) Contrary to the Longs’ argument, when the Bank sought the Tribal Court’s aid in serving process on the Longs for the Bank’s pending state-court eviction action, the Bank did not consent to tribal court jurisdiction over the discrimination claim. The Bank has consistently contended that the Tribal Court lacked jurisdiction. P. 23. 491 F. 3d 878, reversed.

Roberts, C. J., delivered the opinion of the Court, in which Scalia, Kennedy, Thomas, and Alito, JJ., joined, and in which Stevens, Souter, Ginsburg, and Breyer, JJ., joined as to Part II. Ginsburg, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which Stevens, Souter, and Breyer, JJ., joined.
In *Montana v. United States*, 450 U.S. 544, this Court held that, with two limited exceptions, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation. Petitioner’s trading post on such land within the Navajo Nation Reservation is subject to a hotel occupancy tax that the Tribe imposes on any hotel room located within the reservation’s boundaries. The Federal District Court upheld the tax, and the Tenth Circuit affirmed. Relying in part on *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, the latter court complemented *Montana’s* framework with a case-by-case approach that balanced the land’s non-Indian fee status with the Tribe’s sovereign powers, its interests, and the impact that the exercise of its powers had on the nonmembers’ interests. The court concluded that the tax fell under *Montana’s* first exception.

**Held:** The Navajo Nation’s imposition of a hotel occupancy tax upon nonmembers on non-Indian fee land within its reservation is invalid. Pp. 8–14.

(a) *Montana’s* general rule applies to tribal attempts to tax nonmember activity occurring on non-Indian fee land. Tribal jurisdiction is limited: For powers not expressly conferred them by federal statute or treaty, tribes must rely upon their retained or inherent sovereignty. Their power over nonmembers on non-Indian fee land is sharply circumscribed. *Montana* noted only two exceptions: (1) a tribe may regulate the activities of nonmembers who enter consensual relationships with the tribe or its members; and (2) a tribe may exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the tribe’s political integrity, economic security, or health or welfare. 450 U.S., at 565–566. *Montana*’s rule applies to a tribe’s regulatory authority, *id.*, at 566, and adjudicatory authority, *Strate v. A–1 Contractors*, 520 U.S. 438, 453. Citing *Merrion*, respondents submit that *Montana* and *Strate* do not restrict a tribe’s power to impose revenue-raising taxes. However, because *Merrion* noted that a tribe’s inherent taxing power only extended to transactions occurring on trust lands and involving the tribe or its members, 455 U.S., at 137, it is easily reconcilable with the *Montana-Strate* line of authority. A tribe’s sovereign power to tax reaches no further than tribal land. Thus,


Merrion does not exempt taxation from Montana’s general rule, and Montana is applied straight up. Because Congress had not authorized the tax at issue through treaty or statute, and because the incidence of the tax falls upon nonmembers on non-Indian fee land, the Navajo Nation must establish the existence of one of Montana’s exceptions. Pp. 3–8.

(b) Montana’s exceptions do not obtain here. Neither petitioner nor its hotel guests have entered into a consensual relationship with the Navajo Nation justifying the tax’s imposition. Such a relationship must stem from commercial dealing, contracts, leases, or other arrangements, Montana, supra, at 565, and a nonmember’s actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection. Nor is petitioner’s status as an “Indian trader” licensed by the Indian Affairs Commissioner sufficient by itself to support the tax’s imposition. As to Montana’s second exception, petitioner’s operation of a hotel on non-Indian fee land does not threaten or have a direct effect on the tribe’s political integrity, economic security, or health or welfare. Contrary to respondents’ argument, the judgment in Brendale v. Confederated Tribes and Bands of Yakima Nation, 492 U.S. 408, 440, did not give Indian tribes broad authority over nonmembers where the acreage of non-Indian fee land is miniscule in relation to the surrounding tribal land. Irrespective of the percentage of non-Indian fee land within a reservation, Montana’s second exception grants tribes nothing beyond what is necessary to protect tribal self-government or control internal relations. Strate, supra, at 459. Whatever effect petitioner’s operation of its trading post might have upon surrounding Navajo land, it does not endanger the Navajo Nation’s political integrity. Pp. 8–13.

210 F.3d 1247, reversed.

Rehnquist, C. J., delivered the opinion for a unanimous Court. Souter, J., filed a concurring opinion, in which Kennedy and Thomas, JJ., joined.
Indian tribal courts do not have inherent criminal jurisdiction to try and to punish non-Indians, and hence may not assume such jurisdiction unless specifically authorized to do so by Congress. Pp. 195-212.

(a) From the earliest treaties with Indian tribes, it was assumed that the tribes, few of which maintained any semblance of a formal court system, did not have such jurisdiction absent a congressional statute or treaty provision to that effect, and at least one court held that such jurisdiction did not exist. Pp. 196-201.
(b) Congress’ actions during the 19th century reflected that body’s belief that Indian tribes do not have inherent criminal jurisdiction over non-Indians. Pp. 201-206.
(c) The presumption, commonly shared by Congress, the Executive Branch, and lower federal courts, that tribal courts have no power to try non-Indians, carries considerable weight. P. 206.
(d) By submitting to the overriding sovereignty of the United States, Indian tribes necessarily yield the power to try non-Indians except in a manner acceptable to Congress, a fact which seems to be recognized by the Treaty of Point Elliott, signed by the Suquamish Indian Tribe. Pp. 206-211.

544 F.2d 1007 (Oliphant judgment), and Belgarde judgment, reversed.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Two hundred years ago, the area bordering Puget Sound consisted of a large number of politically autonomous Indian villages, each occupied by from a few dozen to over 100 Indians. These loosely related villages were aggregated into a series of Indian tribes, one of which, the Suquamish, has become the focal point of this litigation. By the 1855 Treaty of Point Elliott, 12 Stat. 927, the Suquamish Indian Tribe relinquished all rights that it might have had in the lands of the State of Washington and agreed to settle on a 7,276-acre reservation near Port Madison, Wash. Located on Puget Sound across from the city of Seattle, the Port Madison Reservation is a checkerboard of tribal
community land, allotted Indian lands, property held in fee simple by non-Indians, and various roads and public highways maintained by Kitsap County. 1

The Suquamish Indians are governed by a tribal government which in 1973 adopted a Law and Order Code. The Code, which covers a variety of offenses from theft to rape, purports to extend the Tribe's criminal jurisdiction over both Indians and non-Indians. 2 Proceedings are held in the Suquamish [435 U.S. 191, 194] Indian Provisional Court. Pursuant to the Indian Civil Rights Act of 1968, 82 Stat. 77, 25 U.S.C. 1302, defendants are entitled to many of the due process protections accorded to defendants in federal or state criminal proceedings. 3 However, the guarantees are not identical. Non-Indians, for example, are excluded from Suquamish tribal court juries. 4

Both petitioners are non-Indian residents of the Port Madison Reservation. Petitioner Mark David Oliphant was arrested by tribal authorities during the Suquamish's annual Chief Seattle Days celebration and charged with assaulting a tribal officer and resisting arrest. After arraignment before the tribal court, Oliphant was released on his own recognizance. Petitioner Daniel B. Belgarde was arrested by tribal authorities after an alleged high-speed race along the Reservation highways that only ended when Belgarde collided with a tribal police vehicle. Belgarde posted bail and was released. Six days later he was arraigned and charged under the tribal Code with "recklessly endangering another person" and injuring tribal property. Tribal court proceedings against both petitioners have been stayed pending a decision in this case.

Both petitioners applied for a writ of habeas corpus to the United States District Court for the Western District of Washington. Petitioners argued that the Suquamish Indian Provisional Court does not have criminal jurisdiction over non-Indians. In separate proceedings, the District Court disagreed [435 U.S. 191, 195] with petitioners' argument and denied the petitions. On August 24, 1976, the Court of Appeals for the Ninth Circuit affirmed the denial of habeas corpus in the case of petitioner Oliphant. Oliphant v. Schlie, 544 F.2d 1007. Petitioner Belgarde's appeal is still pending before the Court of Appeals. 5 We granted certiorari, 431 U.S. 964 , to decide whether Indian tribal courts have criminal jurisdiction over non-Indians. We decide that they do not.

Respondents do not contend that their exercise of criminal jurisdiction over non-Indians stems from affirmative congressional authorization or treaty provision. 6 Instead, respondents [435 U.S. 191, 196] urge that such jurisdiction flows automatically from the "Tribe's retained inherent powers of government over the Port Madison Indian Reservation." Seizing on language in our opinions describing Indian tribes as "quasi-sovereign entities," see, e. g., Morton v. Mancari, 417 U.S. 535, 554 (1974), the Court of Appeals agreed and held that Indian tribes, "though conquered and dependent, retain those powers of autonomous states that are neither inconsistent with their status nor expressly terminated by Congress." According to the Court of Appeals, criminal jurisdiction over anyone committing an offense on the reservation is a "sine qua non" of such powers.

The Suquamish Indian Tribe does not stand alone today in its assumption of criminal jurisdiction over non-Indians. Of the 127 reservation court systems that currently exercise criminal jurisdiction in the United States, 33 purport to extend that jurisdiction to non-Indians. 7 Twelve other Indian tribes have enacted ordinances which would permit the assumption of criminal jurisdiction over non-Indians. Like the Suquamish these tribes claim authority to try non-Indians not on the basis of congressional statute or treaty provision but by reason of their retained national sovereignty.

The effort by Indian tribal courts to exercise criminal [435 U.S. 191, 197] jurisdiction over non-Indians, however, is a relatively new phenomenon. And where the effort has been made in the past, it has been held that the jurisdiction did not exist. Until the middle of this century, few Indian tribes maintained any semblance of a formal court system. Offenses by one Indian against another were usually handled by social and religious pressure and not by formal judicial processes; emphasis was on restitution rather
than on punishment. In 1834 the Commissioner of Indian Affairs described the then status of Indian criminal systems: "With the exception of two or three tribes, who have within a few years past attempted to establish some few laws and regulations among themselves, the Indian tribes are without laws, and the chiefs without much authority to exercise any restraint." H. R. Rep. No. 474, 23d Cong., 1st Sess., 91 (1834).

It is therefore not surprising to find no specific discussion of the problem before us in the volumes of the United States Reports. But the problem did not lie entirely dormant for two centuries. A few tribes during the 19th century did have formal criminal systems. From the earliest treaties with these tribes, it was apparently assumed that the tribes did not have criminal jurisdiction over non-Indians absent a congressional statute or treaty provision to that effect. For example, the 1830 Treaty with the Choctaw Indian Tribe, which had one of the most sophisticated of tribal structures, guaranteed to the Tribe "the jurisdiction and government of all the persons and property that may be within their limits." Despite the broad terms of this governmental guarantee, however, the Choctaws at the conclusion of this treaty provision "express a wish that Congress may grant to the Choctaws the right of punishing by their own laws any white man who shall come into their nation, and infringe any of their national regulations." 8 Art. 4, 7 Stat. 333 (emphasis added). Such a request for affirmative congressional authority is inconsistent with respondent's belief that criminal jurisdiction over non-Indians is inherent in tribal sovereignty. Faced by attempts of the Choctaw Tribe to try non-Indian offenders in the early 1800's the United States Attorneys General also concluded that the Choctaws did not have criminal jurisdiction over non-Indians absent congressional authority. See 2 Op. Atty. Gen. 693 (1834); 7 Op. Atty. Gen. 174 (1855). According to the Attorney General in 1834, tribal criminal jurisdiction over non-Indians is, inter alia, inconsistent with treaty provisions recognizing the sovereignty of the United States over the territory assigned to the Indian nation and the dependence of the Indians on the United States.

At least one court has previously considered the power of Indian courts to try non-Indians and it also held against jurisdiction. In Ex parte Kenyon, 14 F. Cas. 353 (No. 7,720) [435 U.S. 191, 200] (WD Ark. 1878), Judge Isaac C. Parker, who as District Court Judge for the Western District of Arkansas was constantly exposed to the legal relationships between Indians and non-Indians, held that to give an Indian tribal court "jurisdiction of the person of an offender, such offender must be an Indian." Id., at 355.

While Congress was concerned almost from its beginning with the special problems of law enforcement on the Indian reservations, it did not initially address itself to the problem of tribal jurisdiction over non-Indians. For the reasons previously stated, there was little reason to be concerned with assertions of tribal court jurisdiction over non-Indians because of the absence of formal tribal judicial systems. Instead, Congress' concern was with providing effective protection for the Indians "from the violence of the lawless part of our frontier inhabitants." Seventh Annual Address of President George Washington, 1 Messages and Papers of the Presidents, 1789-1897, pp. 181, 185 (J. Richardson ed., 1897). Without such protection, it was felt that "all the exertions of the Government to prevent destructive retaliations by the Indians will prove fruitless and all our present agreeable prospects illusory." Ibid. Beginning with the Trade and Intercourse Act of 1790, 1 Stat. 137, therefore, Congress assumed federal jurisdiction over offenses by non-Indians against Indians which "would be punishable by the laws of [the] state or district . . . if the offense had been committed against a citizen or white inhabitant thereof." In 1817, Congress went one step further and extended federal enclave law to the Indian country; the only exception was for "any offence committed by one Indian against another." 3 Stat. 383, now codified, as amended, 18 U.S.C. 1152.

It was in 1834 that Congress was first directly faced with the prospect of Indians trying non-Indians. In the Western Territory bill, Congress proposed to create an Indian territory beyond the western-directed destination of the settlers; the territory was to be governed by a confederation of Indian tribes and was expected ultimately to become a State of the Union. While the bill would have
created a political territory with broad governing powers, Congress was careful not to give the tribes of the territory criminal jurisdiction over United States officials and citizens traveling through the area. The reasons were quite practical:

"Officers, and persons in the service of the United States, and persons required to reside in the Indian country by treaty stipulations, must necessarily be placed under the protection, and subject to the laws of the United States. To persons merely travelling in the Indian country the same protection is extended. The want of fixed laws, of competent tribunals of justice, which must for some time continue in the Indian country, absolutely requires for the peace of both sides that this protection should be extended." H. R. Rep. No. 474, 23d Cong., 1st Sess., 18 (1834).

Congress' concern over criminal jurisdiction in this proposed Indian Territory contrasts markedly with its total failure to address criminal jurisdiction over non-Indians on other reservations, which frequently bordered non-Indian settlements. The contrast suggests that Congress shared the view of the Executive Branch and lower federal courts that Indian tribal courts were without jurisdiction to try non-Indians.

This unspoken assumption was also evident in other congressional actions during the 19th century. In 1854, for example, Congress amended the Trade and Intercourse Act to proscribe the prosecution in federal court of an Indian who has already been tried in tribal court. No similar provision, such as would have been required by parallel logic if tribal courts had jurisdiction over non-Indians, was enacted barring retrial of non-Indians. Similarly, in the Major Crimes Act of 1885, Congress placed under the jurisdiction of federal courts Indian offenders who commit certain specified major offenses. If tribal courts may try non-Indians, however, as respondents contend, those tribal courts are free to try non-Indians even for such major offenses as Congress may well have given the federal courts exclusive jurisdiction to try members of their own tribe committing the exact same offenses.

In 1891, this Court recognized that Congress' various actions and inactions in regulating criminal jurisdiction on Indian reservations demonstrated an intent to reserve jurisdiction over non-Indians for the federal courts. In In re Mayfield, the Court noted that the policy of Congress had been to allow the inhabitants of the Indian country "such power of self-government as was thought to be consistent with the safety of the white population with which they may have come in contact, and to encourage them as far as possible in raising themselves to our standard of civilization." The "general object" of the congressional statutes was to allow Indian nations criminal jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side." Ibid. While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions.

In a 1960 Senate Report, that body expressly confirmed its assumption that Indian tribal courts are without inherent jurisdiction to try non-Indians, and must depend on the Federal Government for protection from intruders. In considering a statute that would prohibit unauthorized entry upon Indian land for the purpose of hunting or fishing, the Senate Report noted:

"The problem confronting Indian tribes with sizable reservations is that the United States provides no protection against trespassers comparable to the protection it gives to Federal property as exemplified by title 18, United States Code, section 1863 [trespass on national forest lands]. Indian property owners should have the same protection as other property owners. For example, a private hunting club may keep nonmembers off its game lands or it may issue a permit for a fee. One who comes on such lands without permission may be prosecuted under State law but a non-Indian trespasser on an Indian reservation enjoys immunity. This is by reason of the fact that Indian tribal law is enforceable against Indians only; not against non-Indians.

...
“Non-Indians are not subject to the jurisdiction of Indian courts and cannot be tried in Indian courts on trespass [435 U.S. 191, 206] charges. Further, there are no Federal laws which can be invoked against trespassers.

. . . .

“The committee has considered this bill and believes that the legislation is meritorious. The legislation will give to the Indian tribes and to individual Indian owners certain rights that now exist as to others, and fills a gap in the present law for the protection of their property.” S. Rep. No. 1686, 86th Cong., 2d Sess., 2-3 (1960) (emphasis added).

II

While not conclusive on the issue before us, the commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians carries considerable weight. Cf. Draper v. United States, 164 U.S. 240, 245-247 (1896); Morris v. Hitchcock, 194 U.S. 384, 391-393 (1904); Warren Trading Post Co. v. Arizona Tax Comm’n, 380 U.S. 685, 690 (1965); DeCoteau v. District County Court, 420 U.S. 425, 444-445 (1975). “Indian law” draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them. Ibid.

While in isolation the Treaty of Point Elliott, 12 Stat. 927 (1855), would appear to be silent as to tribal criminal jurisdiction over non-Indians, the addition of historical perspective casts substantial doubt upon the existence of such jurisdiction. 16 In the Ninth Article, for example, the Suquamish [435 U.S. 191, 207] “acknowledge their dependence on the government of the United States.” As Mr. Chief Justice Marshall explained in Worcester v. Georgia, 6 Pet. 515, 551-552, 554 (1832), such an acknowledgment is not a mere abstract recognition of the United States' sovereignty. "The Indian nations were, from their situation, necessarily dependent on [the United States] . . . for their protection from lawless and injurious intrusions into their country." Id., at 555. By acknowledging their dependence on the United States, in the Treaty of Point Elliott, the Suquamish were in all probability recognizing that the United States would arrest and try non-Indian intruders who came within their Reservation. Other provisions [435 U.S. 191, 208] of the Treaty also point to the absence of tribal jurisdiction. Thus the Tribe “agree[s] not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.” Read in conjunction with 18 U.S.C. 1152, which extends federal enclave law to non-Indian offenses on Indian reservations, this provision implies that the Suquamish are to promptly deliver up any non-Indian offender, rather than try and punish him themselves. 17

By themselves, these treaty provisions would probably not be sufficient to remove criminal jurisdiction over non-Indians if the Tribe otherwise retained such jurisdiction. But an examination of our earlier precedents satisfies us that, even ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress. Indian tribes do retain elements of “quasi-sovereign” authority after ceding their lands to the United States and announcing their dependence on the Federal Government. See Cherokee Nation v. Georgia, 5 Pet. 1, 15 (1831). But the tribes’ retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court of Appeals recognized, Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers "inconsistent with their status." Oliphant v. Schlie, 544 F.2d, at 1009 (emphasis added).

Indian reservations are "a part of the territory of the United [435 U.S. 191, 209] States." United States v. Rogers, 4 How. 567, 571 (1846). Indian tribes "hold and occupy [the reservations] with the assent of the United States, and under their authority." Id., at 572. Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. "[T]heir rights to complete sovereignty, as independent nations, [are] necessarily diminished," Johnson v. M'Intosh, 8 Wheat. 543, 574 (1823).
We have already described some of the inherent limitations on tribal powers that stem from their incorporation into the United States. In Johnson v. M'Intosh, supra, we noted that the Indian tribes’ “power to dispose of the soil at their own will, to whomsoever they pleased,” was inherently lost to the overriding sovereignty of the United States. And in Cherokee Nation v. Georgia, supra, the Chief Justice observed that since Indian tribes are “completely under the sovereignty and dominion of the United States, . . . any attempt [by foreign nations] 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.” 5 Pet., at 17-18.

Nor are the intrinsic limitations on Indian tribal authority restricted to limitations on the tribes’ power to transfer lands or exercise external political sovereignty. In the first case to reach this Court dealing with the status of Indian tribes, Mr. Justice Johnson in a separate concurrence summarized the nature of the limitations inherently flowing from the overriding sovereignty of the United States as follows: “[T]he restrictions upon the right of soil in the Indians, amount . . . to an exclusion of all competitors [to the United States] from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves.” Fletcher v. Peck, 6 Cranch 87, 147 (1810) (emphasis added). Protection of territory within its external political boundaries is, of course, as central to the sovereign interests of the United States as it is to any other sovereign nation. But from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. This principle would have been obvious a century ago when most Indian tribes were characterized by a “want of fixed laws [and] of competent tribunals of justice.” H. R. Rep. No. 474, 23d Cong., 1st Sess., 18 (1834). It should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents.

In Ex parte Crow Dog, 109 U.S. 556 (1883), the Court was faced with almost the inverse of the issue before us here - whether, prior to the passage of the Major Crimes Act, federal courts had jurisdiction to try Indians who had offended against fellow Indians on reservation land. In concluding that criminal jurisdiction was exclusively in the tribe, it found particular guidance in the “nature and circumstances of the case.” The United States was seeking to extend United States

“law, by argument and inference only, . . . over aliens and strangers; over the members of a community separated by race [and] tradition, . . . from the authority and power which seeks to impose upon them the restraints of an external and unknown code . . . ; which judges them by a standard made by others and not for them . . . . It tries them, not by their peers, nor by the customs of [435 U.S. 191, 211] their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception . . . .” Id., at 571. These considerations, applied here to the non-Indian rather than Indian offender, speak equally strongly against the validity of respondents’ contention that Indian tribes, although fully subordinated to the sovereignty of the United States, retain the power to try non-Indians according to their own customs and procedure.

As previously noted, Congress extended the jurisdiction of federal courts, in the Trade and Intercourse Act of 1790, to offenses committed by non-Indians against Indians within Indian Country. In doing so, Congress was careful to extend to the non-Indian offender the basic criminal rights that would attach in non-Indian related cases. Under respondents’ theory, however, Indian tribes would have been free to try the same non-Indians without these careful proceedings unless Congress affirmatively legislated to the contrary. Such an exercise of jurisdiction over non-Indian citizens of the United States would belie the tribes’ forfeiture of full sovereignty in return for the protection of the United States.

In summary, respondents’ position ignores that
"Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist in the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they . . . exist in subordination to one or the other of these." United States v. Kagama, 118 U.S. 375, 379 (1886).

We recognize that some Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts. We also acknowledge that with the passage of the Indian Civil Rights Act of 1968, which extends certain basic procedural rights to anyone tried in Indian tribal court, many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared. Finally, we are not unaware of the prevalence of non-Indian crime on today's reservations which the tribes forcefully argue requires the ability to try non-Indians. But these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians. They have little relevance to the principles which lead us to conclude that Indian tribes do not have inherent jurisdiction to try and to punish non-Indians. The judgments below are therefore reversed.

MR. JUSTICE BRENNAN took no part in the consideration or decision of these cases.

Footnotes

[ Footnote 1 ] According to the District Court's findings of fact: "[The] Port Madison Indian Reservation consists of approximately 7276 acres of which approximately 63% thereof is owned in fee simple absolute by non-Indians and the remainder 37% is Indian-owned lands subject to the trust status of the United States, consisting mostly of unimproved acreage upon which no persons reside. Residing on the reservation is an estimated population of approximately 2928 non-Indians living in 976 dwelling units. There lives on the reservation approximately 50 members of the Suquamish Indian Tribe. Within the reservation are numerous public highways of the State of Washington, public schools, public utilities and other facilities in which neither the Suquamish Indian Tribe nor the United States has any ownership or interest." App. 75. The Suquamish Indian Tribe, unlike many other Indian tribes, did not consent to non-Indian homesteading of unallotted or "surplus" lands within their reservation pursuant to 25 U.S.C. 348 and 43 U.S.C. 1195-1197. Instead, the substantial non-Indian population on the Port Madison Reservation is primarily the result of the sale of Indian allotments to non-Indians by the Secretary of the Interior. Congressional legislation has allowed such sales where the allotments were in heirship, fell to "incompetents," or were surrendered in lieu of other selections. The substantial non-Indian landholdings on the Reservation are also a result of the lifting of various trust restrictions, a factor which has enabled individual Indians to sell their allotments. See 25 U.S.C. 349, 392.

[ Footnote 2 ] Notices were placed in prominent places at the entrances to the Port Madison Reservation informing the public that entry onto the Reservation would be deemed implied consent to the criminal jurisdiction of the Suquamish tribal court.

[ Footnote 3 ] In Talton v. Mayes, 163 U.S. 376 (1896), this Court held that the Bill of Rights in the Federal Constitution does not apply to Indian tribal governments.

[ Footnote 4 ] The Indian Civil Rights Act of 1968 provides for "a trial by jury of not less than six persons," 25 U.S.C. 1302 (10), but the tribal court is not explicitly prohibited from excluding non-Indians from the jury even where a non-Indian is being tried. In 1977, the Suquamish Tribe amended its Law and Order Code to provide that only Suquamish tribal members shall serve as jurors in tribal court.

[ Footnote 5 ] Belgarde's petition for certiorari was granted while his appeal was still pending before the Court of Appeals for the Ninth Circuit. No further proceedings in that court have been held pending our decision.
Respondents do contend that Congress has "confirmed" the power of Indian tribes to try and to punish non-Indians through the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U.S.C. 476, and the Indian Civil Rights Act of 1968, 25 U.S.C. 1302. Neither Act, however, addresses, let alone "confirms," tribal criminal jurisdiction over non-Indians. The Indian Reorganization Act merely gives each Indian tribe the right "to organize for its common welfare" and to "adopt an appropriate constitution and bylaws." With certain specific additions not relevant here, the tribal council is to have such powers as are vested "by existing law." The Indian Civil Rights Act merely extends to "any person" within the tribe's jurisdiction certain enumerated guarantees of the Bill of Rights of the Federal Constitution. As respondents note, an early version of the Indian Civil Rights Act extended its guarantees only to "American Indians," rather than to "any person." The purpose of the later modification was to extend the Act's guarantees to "all persons who may be subject to the jurisdiction of tribal governments, whether Indians or non-Indians." Summary Report on the Constitutional Rights of American Indians, Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., 10 (1966). But this change was certainly not intended to give Indian tribes criminal jurisdiction over non-Indians. Nor can it be read to "confirm" respondents' argument that Indian tribes have inherent criminal jurisdiction over non-Indians. Instead, the modification merely demonstrates Congress' desire to extend the Act's guarantees to non-Indians if and where they come under a tribe's criminal or civil jurisdiction by either treaty provision or Act of Congress.

Of the 127 courts currently operating on Indian reservations, 71 (including the Suquamish Indian Provisional Court) are tribal courts, established and functioning pursuant to tribal legislative powers; 30 are "CFR Courts" operating under the Code of Federal Regulations, 25 CFR 11.1 et seq. (1977); 16 are traditional courts of the New Mexico pueblos; and 10 are conservation courts. The CFR Courts are the offspring of the Courts of Indian Offenses, first provided for in the Indian Department Appropriations Act of 1888, 25 Stat. 217, 233. See W. Hagan, Indian Police and Judges (1966). By regulations issued in 1935, the jurisdiction of CFR Courts is restricted to offenses committed by Indians within the reservation. 25 CFR 11.2 (a) (1977). The case before us is concerned only with the criminal jurisdiction of tribal courts.

The history of Indian treaties in the United States is consistent with the principle that Indian tribes may not assume criminal jurisdiction over non-Indians without the permission of Congress. The earliest treaties typically expressly provided that "any citizen of the United States, who shall do an injury to any Indian of the [tribal] nation, or to any other Indian or Indians residing in their towns, and under their protection, shall be punished according to the laws of the United States." See, e.g., Treaty with the Shawnees, Art. III, 7 Stat. 26 (1786). While, as elaborated further below, these provisions were not necessary to remove criminal jurisdiction over non-Indians from the Indian tribes, they would naturally have served an important function in the developing stage of United States-Indian relations by clarifying jurisdictional limits of the Indian tribes. The same treaties generally provided that "[i]f any citizen of the United States . . . shall attempt to settle on any of the lands hereby allotted to the Indians to live and hunt on, such person shall forfeit the protection of the United States of America, and the Indians may punish him or not as they please." See, e.g., Treaty with the Choctaws, Art. IV, 7 Stat. 22 (1786). Far from representing a recognition of any inherent Indian criminal jurisdiction over non-Indians settling on tribal lands, these provisions were instead intended as a means of discouraging non-Indian settlements on Indian territory, in contravention of treaty provisions to the contrary. See 5 Annals of Cong. 903-904 (1798). Later treaties dropped this provision and provided instead that non-Indian settlers would be removed by the United States upon complaint being lodged by the tribe. See, e.g., Treaty with the Sacs and Foxes, 7 Stat. 84 (1804). As the relationship between Indian tribes and the United States developed through the passage of time, specific provisions for the punishment of non-Indians by the United States, rather than by the tribes, slowly disappeared from the treaties. Thus, for example, none of the treaties signed by Washington Indians in the 1850's explicitly proscribed criminal prosecution and punishment of non-Indians by the Indian tribes. As discussed below, however, several of the treaty provisions can be read as recognizing that criminal jurisdiction over non-Indians would be in the United States rather than in the tribes. The disappearance of provisions explicitly providing for the punishment of non-Indians by the United States, rather than by the Indian tribes, coincides with and is at least partly explained by the extension of federal enclave law over non-Indians in the Trade and Intercourse Acts and
the general recognition by Attorneys General and lower federal courts that Indians did not have jurisdiction [435 U.S. 191, 199] to try non-Indians. See infra, at 198-201. When it was felt necessary to expressly spell out respective jurisdictions, later treaties still provided that criminal jurisdiction over non-Indians would be in the United States. See, e.g., Treaty with the Utah-Tabeguache Band, Art. 6, 13 Stat. 674 (1863). Only one treaty signed by the United States has ever provided for any form of tribal criminal jurisdiction over non-Indians (other than in the illegal-settler context noted above). The first treaty signed by the United States with an Indian tribe, the 1778 Treaty with the Delawares, provided that neither party to the treaty could "proceed to the infliction of punishments on the citizens of the other, otherwise than by securing the offender or offenders by imprisonment, or any other competent means, till a fair and impartial trial can be had by judges or juries of both parties, as near as can be to the laws, customs and usages of the contracting parties and natural justice: The mode of such tryals to be hereafter fixed by the wise men of the United States in Congress assembled, with the assistance of . . . deputies of the Delaware nation . . . " Treaty with the Delawares, Art. IV, 7 Stat. 14 (emphasis added). While providing for Delaware participation in the trial of non-Indians, this treaty section established that non-Indians could only be tried under the auspices of the United States and in a manner fixed by the Continental Congress.

[ Footnote 9 ] According to Felix Cohen's Handbook of Federal Indian Law 148 (U.S. Dept. of the Interior 1941) "attempts of tribes to exercise jurisdiction over non-Indians . . . have been generally condemned by the federal courts since the end of the treaty-making period, and the writ of habeas corpus has been used to discharge white defendants from tribal custody."

[ Footnote 10 ] Judge Parker sat as the judge of the United States District Court for the Western District of Arkansas from 1875 until 1896. By reason of the laws of Congress in effect at the time, that particular court not only handled the normal docket of federal cases arising in the Western District of Arkansas, but also had criminal jurisdiction over what was then called the "Indian Territory." This area varied in size during Parker's tenure; at one time it extended as far west as the eastern border of Colorado, and always included substantial parts of what would later become the State of Oklahoma. In the exercise of this jurisdiction over the Indian Territory, the Court in which he sat was necessarily in constant contact with individual Indians, the tribes of which they were members, and the white men who dealt with them and often preyed upon them. Judge Parker's views of the law were not always upheld by this Court. See 2 J. Wigmore, Evidence 276, pp. 115-116, n. 3 (3d ed. 1940). A reading of Wigmore, however, indicates that he was as critical of the decisions of this Court there mentioned as this Court was of the evidentiary rulings of Judge Parker. Nothing in these long forgotten disputes detracts from the universal esteem in which the Indian tribes which were subject to the jurisdiction of his court held Judge Parker. One of his biographers, describing the judge's funeral, states that after the grave was filled "[t]he principal chief of the Choctaws, Pleasant Porter, came forward and placed a wreath of wild flowers on the grave." H. Croy, He Hanged Them High 222 (1952). It may be that Judge Parker's views as to the ultimate destiny of the Indian people are not in accord with current thinking on the subject, but we have observed in more than one of our cases that the views of the people on this issue as reflected in the judgments of Congress itself have changed from one era to the next. See Kake Village v. Egan, 369 U.S. 60, 71-74 (1962). There cannot be the slightest doubt that Judge Parker was, by his own lights and by the lights of the time in which he lived, a judge who was thoroughly acquainted with and sympathetic to the Indians and Indian tribes which were subject to the jurisdiction of his court, as well as familiar with the law which governed them. See generally Hell on the Border (1971, J. Gregory & R. Strickland, eds.)

[ Footnote 11 ] The 1970 opinion of the Solicitor was withdrawn in 1974 but has not been replaced. No reason was given for the withdrawal.


[ Footnote 13 ] The Western Territory bill, like the early Indian treaties, see n. 6, supra, did not extend the protection of the United States to non-Indians who settled without Government business in Indian territory. See Western Territory bill, 6, in H. R. Rep. No. 474, supra, at 35; id., at 18. This exception, like that in the early treaties, was presumably meant to discourage settlement on land that was reserved exclusively for the use of the various Indian tribes. Today, many reservations, including the Port Madison
Reservation, have extensive non-Indian populations. The percentage of non-Indian residents grew as a direct and intended result of congressional policies in the late 19th and early 20th centuries promoting the assimilation of the Indians into the non-Indian culture. Respondents point to no statute, in comparison to the Western Territory bill, where Congress has intended to give Indian tribes jurisdiction today over non-Indians residing within reservations. Even as drafted, many Congressmen felt that the bill was too radical a shift in United states-Indian relations and the bill was tabled. See 10 Cong. Deb. 4779 (1834). While the Western Territory bill was resubmitted several times in revised form, it was never passed. See generally R. Gittinger, The Formation of the State of Oklahoma (1939).

[ Footnote 14 ] The Major Crimes Act provides that Indians committing any of the enumerated offenses "shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." (Emphasis added.) While the question has never been directly addressed by this Court, Courts of Appeals have read this language to exclude tribal jurisdiction over the Indian offender. See, e. g., Sam v. United States, 385 F.2d 213, 214 (CA10 1967); Felicia v. United States, 495 F.2d 353, 354 (CA8 1974). We have no reason to decide today whether jurisdiction under the Major Crimes Act is exclusive. The legislative history of the original version of the Major Crimes Act, which was introduced as a House amendment to the Indian Appropriation [435 U.S. 191, 204] Act of 1855, creates some confusion on the question of exclusive jurisdiction. As originally worded, the amendment would have provided for trial in the United States courts "and not otherwise." Apparently at the suggestion of Congressman Budd, who believed that concurrent jurisdiction in the courts of the United States was sufficient, the words "and not otherwise" were deleted when the amendment was later reintroduced. See 16 Cong. Rec. 934-935 (1885). However, as finally accepted by the Senate and passed by both Houses, the amendment did provide that the Indian offender would be punished as any other offender, "within the exclusive jurisdiction of the United States." The issue of exclusive jurisdiction over major crimes was mooted for all practical purposes by the passage of the Indian Civil Rights Act of 1968 which limits the punishment that can be imposed by Indian tribal courts to a term of 6 months or a fine of $500.

[ Footnote 15 ] In 1977, a congressional Policy Review Commission, citing the lower court decisions in Oliphant and Belgarde, concluded that "[t]here is an established legal basis for tribes to exercise jurisdiction over non-Indians." 1 Final Report of the American Indian Policy Review Commission 114, 117, 152-154 (1977). However, the Commission's report does not deny that for almost 200 years before the lower courts decided Oliphant and Belgarde, the three branches of the Federal Government were in apparent agreement that Indian tribes do not have jurisdiction over non-Indians. As the Vice Chairman of the Commission, Congressman Lloyd Meeds, noted in dissent, "such jurisdiction has generally not been asserted and . . . the lack of legislation on this point reflects a congressional assumption that there was no such tribal jurisdiction." Final Report, supra, at 587.

[ Footnote 16 ] When treaties with the Washington Tribes were first contemplated, the Commissioner of Indian Affairs sent instructions to the Commission to Hold Treaties with the Indian Tribes in Washington Territory and in the Blackfoot Country. Included with the instructions were copies of treaties [435 U.S. 191, 207] previously negotiated with the Omaha Indians, 10 Stat. 1043 (1854), and with the Ottoo and Missouria Indians, 10 Stat. 1038 (1854), which the Commissioner "regarded as exhibiting provisions proper on the part of the Government and advantages to the Indians" and which he felt would "afford valuable suggestions." The criminal provisions of the Treaty of Point Elliott are clearly patterned after the criminal provisions in these "exemplary" treaties, in most respects copying the provisions verbatim. Like the Treaty of Point Elliott, the treaties with the Omahas and with the Ottooes and Missourias did not specifically address the issue of tribal criminal jurisdiction over non-Indians. Sometime after the receipt of these instructions, the Washington treaty Commission itself prepared and discussed a draft treaty which specifically provided that "[i]njuries committed by whites towards them [are] not to be revenged, but on complaint being made they shall be tried by the Laws of the United States and if convicted the offenders punished." For some unexplained reason, however, in negotiating a treaty with the Indians, the Commission went back to the language used in the two "exemplary" treaties sent by the Commissioner of Indian Affairs. Although respondents contend that the Commission returned to the original language because of tribal opposition to relinquishment of criminal jurisdiction over non-Indians, there is no
evidence to support this view of the matter. Instead, it seems probable that the Commission preferred to use the language that had been recommended by the Office of Indian Affairs. As discussed below, the language ultimately used, wherein the Tribe acknowledged its dependence on the United States and promised to be “friendly with all citizens thereof,” could well have been understood as acknowledging exclusive federal criminal jurisdiction over non-Indians.

[Footnote 17] In interpreting Indian treaties and statutes, “‘[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.’” McClanahan v. Arizona State Tax Comm’n, 411 U.S. 164, 174 (1973), see Kansas Indians, 5 Wall. 737, 760 (1866); United States v. Nice, 241 U.S. 591, 599 (1916). But treaty and statutory provisions which are not clear on their face may “be clear from the surrounding circumstances and legislative history.” Cf. DeCoteau v. District County Court, 420 U.S. 425, 444 (1975).


MR. JUSTICE MARSHALL, with whom THE CHIEF JUSTICE joins, dissenting.

I agree with the court below that the “power to preserve order on the reservation... is a sine qua non of the sovereignty that the Suquamish originally possessed.” Oliphant v. Schlie, 544 F.2d 1007, 1009 (CA9 1976). In the absence of affirmative withdrawal by treaty or statute, I am of the view that Indian tribes enjoy as a necessary aspect of their retained sovereignty the right to try and punish all persons who commit offenses against tribal law within the reservation. Accordingly, I dissent. [435 U.S. 191, 213]
This case concerns the sale of fee land on a tribal reservation by a non-Indian bank to non-Indian individuals. Following the sale, an Indian couple, customers of the bank who had defaulted on their loans, claimed the bank discriminated against them by offering the land to non-Indians on terms more favorable than those the bank offered to them. The couple sued on that claim in tribal court; the bank contested the court's jurisdiction. The tribal court concluded that it had jurisdiction and proceeded to hear the case. It ultimately ruled against the bank and awarded the Indian couple damages and the right to purchase a portion of the fee land. The question presented is whether the tribal court had jurisdiction to adjudicate a discrimination claim concerning the non-Indian bank's sale of fee land it owned. We hold that it did not.

I

The Long Family Land and Cattle Company, Inc. (Long
Company or Company), is a family-run ranching and farming operation incorporated under the laws of South Dakota. Its lands are located on the Cheyenne River Sioux Indian Reservation. Once a massive, 60-million acre affair, the reservation was appreciably diminished by Congress in the 1880s and at present consists of roughly 11 million acres located in Dewey and Ziebach Counties in north-central South Dakota. The Long Company is a respondent here, along with Ronnie and Lila Long, husband and wife, who together own at least 51 percent of the Company’s shares. Ronnie and Lila Long are both enrolled members of the Cheyenne River Sioux Indian Tribe.

The Longs and their Company have been customers for many years at Plains Commerce Bank (Bank), located some 25 miles off the reservation as the crow flies in Haven, South Dakota. The Bank, like the Long Company, is a South Dakota corporation, but has no ties to the reservation other than its business dealings with tribal members. The Bank made its first commercial loan to the Long Company in 1989, and a series of agreements followed. As part of those agreements, Kenneth Long—Ronnie Long’s father and a non-Indian—mortgaged to the Bank 2,230 acres of fee land he owned inside the reservation. At the time of Kenneth Long’s death in the summer of 1995, Kenneth and the Long Company owed the Bank $750,000.

In the spring of 1996, Ronnie and Lila Long began negotiating a new loan contract with the Bank in an effort to shore up their Company’s flagging financial fortunes and come to terms with their outstanding debts. After several months of back-and-forth, the parties finally reached an agreement in December of that year—two agreements, to be precise. The Company and the Bank signed a fresh loan contract, according to which Kenneth Long’s estate deeded over the previously mortgaged fee acreage to the Bank in lieu of foreclosure. App. 104. In return, the Bank agreed to cancel some of the Company’s
debt and to make additional operating loans. The parties also agreed to a lease arrangement: The Company received a two-year lease on the 2,230 acres, deeded over to the Bank, with an option to purchase the land at the end of the term for $468,000. *Id.*, at 96–103.

It is at this point, the Longs claim, that the Bank began treating them badly. The Longs say the Bank initially offered more favorable purchase terms in the lease agreement, allegedly proposing to sell the land back to the Longs with a 20-year contract for deed. The Bank eventually rescinded that offer, the Longs claim, citing “‘possible jurisdictional problems’” that might have been caused by the Bank financing an “‘Indian owned entity on the reservation.’” 491 F. 3d 878, 882 (CA8 2007) (case below).

Then came the punishing winter of 1996–1997. The Longs lost over 500 head of cattle in the blizzards that season, with the result that the Long Company was unable to exercise its option to purchase the leased acreage when the lease contract expired in 1998. Nevertheless, the Longs refused to vacate the property, prompting the Bank to initiate eviction proceedings in state court and to petition the Cheyenne River Sioux Tribal Court to serve the Longs with a notice to quit. In the meantime, the Bank sold 320 acres of the fee land it owned to a non-Indian couple. In June 1999, while the Longs continued to occupy a 960-acre parcel of the land, the Bank sold the remaining 1,910 acres to two other nonmembers.

In July 1999, the Longs and the Long Company filed suit against the Bank in the Tribal Court, seeking an injunction to prevent their eviction from the property and to reverse the sale of the land. They asserted a variety of claims, including breach of contract, bad faith, violation of tribal-law self-help remedies, and discrimination. The discrimination claim alleged that the Bank sold the land to nonmembers on terms more favorable than those offered the Company. The Bank asserted in its answer that
the court lacked jurisdiction and also stated a counter-claim. The Tribal Court found that it had jurisdiction, denied the Bank’s motion for summary judgment on its counterclaim, and proceeded to trial. Four causes of action were submitted to the seven-member jury: breach of contract, bad faith, violation of self-help remedies, and discrimination.

The jury found for the Longs on three of the four causes, including the discrimination claim, and awarded a $750,000 general verdict. After denying the Bank’s post-trial motion for judgment notwithstanding the verdict by finding again that it had jurisdiction to adjudicate the Longs’ claims, the Tribal Court entered judgment awarding the Longs $750,000 plus interest. A later supplemental judgment further awarded the Longs an option to purchase the 960 acres of the land they still occupied on the terms offered in the original purchase option, effectively nullifying the Bank’s previous sale of that land to non-Indians.

The Bank appealed to the Cheyenne River Sioux Tribal Court of Appeals, which affirmed the judgment of the trial court. The Bank then filed the instant action in the United States District Court for the District of South Dakota, seeking a declaration that the tribal judgment was null and void because, as relevant here, the Tribal Court lacked jurisdiction over the Longs’ discrimination claim. The District Court granted summary judgment to the Longs. The court found tribal court jurisdiction proper because the Bank had entered into a consensual relationship with the Longs and the Long Company. 440 F. Supp. 2d 1070, 1077–1078, 1080–1081 (SD 2006). According to the District Court, this relationship brought the Bank within the first category of tribal civil jurisdiction over nonmembers outlined in Montana v. United States, 450 U. S. 544 (1981). See 440 F. Supp. 2d, at 1077–1078.

The Court of Appeals for the Eighth Circuit affirmed.
The Longs’ discrimination claim, the court held, “arose directly from their preexisting commercial relationship with the bank.” Id., at 887. When the Bank chose to deal with the Longs, it effectively consented to substantive regulation by the tribe: An antidiscrimination tort claim was just another way of regulating the commercial transactions between the parties. See ibid. In sum, the Tribe had authority to regulate the business conduct of persons who “voluntarily deal with tribal members,” including, here, a nonmember’s sale of fee land. Ibid.

We granted certiorari, 552 U. S. ___ (2008), and now reverse.

II

Before considering the Tribal Court’s authority to adjudicate the discrimination claim, we must first address the Longs’ contention that the Bank lacks standing to raise this jurisdictional challenge in the first place. Though the Longs raised their standing argument for the first time before this Court, we bear an independent obligation to assure ourselves that jurisdiction is proper before proceeding to the merits. See Steel Co. v. Citizens for Better Environment, 523 U. S. 83, 94–95 (1998).

We begin by noting that whether a tribal court has adjudicative authority over nonmembers is a federal question. See Iowa Mut. Ins. Co. v. LaPlante, 480 U. S. 9, 15 (1987); National Farmers Union Ins. Cos. v. Crow Tribe, 471 U. S. 845, 852–853 (1985). If the tribal court is found to lack such jurisdiction, any judgment as to the nonmember is necessarily null and void. The Longs do not contest this settled principle but argue instead that the Bank has suffered no “injury in fact” as required by Article III’s case-or-controversy provision. See Lujan v. Defenders of Wildlife, 504 U. S. 555, 560 (1992).

The Longs appear to recognize their argument is somewhat counterintuitive. They concede the jury found the
Bank guilty of discrimination and awarded them $750,000 plus interest. But the Longs contend the jury's damages award was in fact premised entirely on their breach-of-contract rather than on their discrimination claim. The Bank does not presently challenge the breach-of-contract verdict.

In support of their argument, the Longs point to their amended complaint in the Tribal Court. The complaint comprised nine counts. Several of the counts sought damages; the discrimination count did not. As relief for the discrimination claim, the Longs asked to be granted “possession and title to their land.” App. 173. The Longs contend that the damage award therefore had nothing to do with the discrimination claim. As a result, a decision from this Court finding no jurisdiction with respect to that claim—the only claim the Bank appeals—would not change anything.

We are not persuaded. The jury verdict form consisted of six special interrogatories, covering each claim asserted against the Bank, with another one covering the amount of damages to be awarded. Id., at 190–192. The damages interrogatory specifically allowed the jury to make an award after finding liability as to any of the individual claims: “If you answered yes to Numbers 1, 3, 4, or 5 what amount of damages should be awarded to the Plaintiffs?” Id., at 192 (emphasis added). The jury found against the Bank on three of the special interrogatories, including number 4, the discrimination claim. The Bank, the jurors found, “intentionally discriminat[ed] against the Plaintiffs Ronnie and Lila Long.” Id., at 191. The jury then entered an award of $750,000. Id., at 192. These facts establish that the jury could have based its damages award, in whole or in part, on the finding of discrimination.

There is, in addition, the option to purchase. The Longs argue that requiring the Bank to void the sale to non-members of a 960-acre parcel and sell that parcel to them
instead does not constitute injury-in-fact, because the Tribal Court actually denied the relief the Longs sought for the Bank’s discrimination. In its supplemental judgment, the Tribal Court refused to permit the Longs (or the Long Company) to purchase all the land—as they had requested—instead granting an option to purchase only the 960 acres the Longs occupied at the time. See Supplemental Judgment in No. R–120–99, Long Family Land & Cattle Co. v. Maciejewski, (Feb. 18, 2003), App. to Pet. for Cert. A–69 to A–70. Even this partial relief, the Longs insist, was crafted as an equitable remedy for their breach-of-contract claim, see Brief for Respondents 32–34, and in any event the Bank really suffered no harm, because it would gain as much income selling to the Longs as it did selling to the nonmembers, see id., at 34–35.

These arguments do not defeat the Bank’s standing. The Longs requested, as a remedy for the alleged discrimination, “possession and title” to the subject land. App. 173. They received an option to acquire a portion of exactly that. See App. to Pet. for Cert. A–69 to A–70. The Tribal Court’s silence in its supplemental judgment as to which claim, exactly, the option to purchase was meant to remedy is immaterial. See ibid. Of the four claims presented to the jury, only the discrimination claim sought deed to the land as relief. See Amended Complaint (Jan. 3, 2000), App. 158, 173. Nor does the fact that the remedial purchase option applied only to a portion of the total parcel eliminate the Bank’s injury. The Bank had no obligation to sell the land to the Longs before the Tribal Court’s judgment—indeed, the Bank had already sold the acreage to third parties. The Tribal Court judgment effectively nullified a portion of that sale. This judicially imposed burden certainly qualifies as an injury for standing purposes. As for the Longs’ speculation that the Bank would make as much money selling the land to them as it did selling the parcel to nonmembers, the argument is
entirely beside the point. There is more than adequate injury in being compelled to undo one deed and enter into another—particularly with individuals who had previously defaulted on loans.

Both with respect to damages and the option to purchase, the Bank was injured by the Tribal Court’s exercise of jurisdiction over the discrimination claim. Those injuries can be remedied by a ruling in favor of the Bank that the Tribal Court lacked jurisdiction and that its judgment on the discrimination claim is null and void. The ultimate collateral consequence of such a determination, whatever it may be—vacatur of the general damages award, vacatur of the option to purchase, a new trial on the other claims—does not alter the fact that the Bank has shown injury traceable to the challenged action and likely to be remedied by a favorable ruling. Allen v. Wright, 468 U. S. 737, 751 (1984). The Bank has Article III standing to pursue this challenge.

III
A

For nearly two centuries now, we have recognized Indian tribes as “distinct, independent political communities,” Worcester v. Georgia, 6 Pet. 515, 559 (1832), qualified to exercise many of the powers and prerogatives of self-government, see United States v. Wheeler, 435 U. S. 313, 322–323 (1978). We have frequently noted, however, that the “sovereignty that the Indian tribes retain is of a unique and limited character.” Id., at 323. It centers on the land held by the tribe and on tribal members within the reservation. See United States v. Mazurie, 419 U. S. 544, 557 (1975) (tribes retain authority to govern “both their members and their territory,” subject ultimately to Congress); see also Nevada v. Hicks, 533 U. S. 353, 392 (2001) (“[T]ribes retain sovereign interests in activities that occur on land owned and controlled by the tribe”)
Opinion of the Court

(O'Connor, J., concurring in part and concurring in judgment).

As part of their residual sovereignty, tribes retain power to legislate and to tax activities on the reservation, including certain activities by nonmembers, see Kerr-McGee Corp. v. Navajo Tribe, 471 U. S. 195, 201 (1985), to determine tribal membership, see Santa Clara Pueblo v. Martinez, 436 U. S. 49, 55 (1978), and to regulate domestic relations among members, see Fisher v. District Court of Sixteenth Judicial Dist. of Mont., 424 U. S. 382, 387–389 (1976) (per curiam). They may also exclude outsiders from entering tribal land. See Duro v. Reina, 495 U. S. 676, 696–697 (1990). But tribes do not, as a general matter, possess authority over non-Indians who come within their borders: “[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” Montana, at 450 U. S., at 565. As we explained in Oliphant v. Suquamish Tribe, 435 U. S. 191 (1978), the tribes have, by virtue of their incorporation into the American republic, lost “the right of governing . . . person[s] within their limits except themselves.” Id., at 209 (emphasis and internal quotation marks omitted).

This general rule restricts tribal authority over non-member activities taking place on the reservation, and is particularly strong when the nonmember’s activity occurs on land owned in fee simple by non-Indians—what we have called “non-Indian fee land.” Strate v. A–1 Contractors, 520 U. S. 438, 446 (1997) (internal quotation marks omitted). Thanks to the Indian General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U. S. C. §331 et seq., there are millions of acres of non-Indian fee land located within the contiguous borders of Indian tribes. See Atkinson Trading Co. v. Shirley, 532 U. S. 645, 648, 651, n. 1 (2001). The history of the General Allotment Act and its successor statutes has been well rehearsed in our precedents. See, e.g., Montana, supra, at 558–563; County of

Our cases have made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it. See County of Yakima, supra, at 267–268 (General Allotment Act permits Yakima County to impose ad valorem tax on fee land located within the reservation); Goudy v. Meath, 203 U. S. 146, 140–150 (1906) (by rendering allotted lands alienable, General Allotment Act exposed them to state assessment and forced sale for taxes); In re Heff, 197 U. S. 488, 502–503 (1905) (fee land subject to plenary state jurisdiction upon issuance of trust patent (superseded by the Burke Act, 34 Stat. 182, 25 U. S. C. §349) (2000 ed.)). Among the powers lost is the authority to prevent the land’s sale, see County of Yakima, supra, at 263 (General Allotment Act granted fee holders power of voluntary sale)—not surprisingly, as “free alienability” by the holder is a core attribute of the fee simple, C. Moynihan, Introduction to Law of Real Property §3, p. 32 (2d ed. 1988). Moreover, when the tribe or tribal members convey a parcel of fee land “to non-Indians, [the tribe] loses any former right of absolute and exclusive use and occupation of the conveyed lands.” South Dakota v. Bourland, 508 U. S. 679, 689 (1993) (emphasis added). This necessarily entails the “the loss of regulatory jurisdiction over the use of the land by others.” Ibid. As a general rule, then, “the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land.” Brendale v. Confederated Tribes and Bands of Yakima Nation, 492 U. S. 408, 430 (1989) (opinion of White, J.).
We have recognized two exceptions to this principle, circumstances in which tribes may exercise “civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.” Montana, 450 U. S., at 565. First, “[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” Ibid. Second, a tribe may exercise “civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” Id., at 566. These rules have become known as the Montana exceptions, after the case that elaborated them. By their terms, the exceptions concern regulation of “the activities of nonmembers” or “the conduct of non-Indians on fee land.”

Given Montana’s “‘general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,’” Atkinson, supra, at 651 (quoting Montana, supra, at 565), efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are “presumptively invalid,” Atkinson, supra, at 659. The burden rests on the tribe to establish one of the exceptions to Montana’s general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land. Atkinson, 532 U. S., at 654. These exceptions are “limited” ones, id., at 647, and cannot be construed in a manner that would “swallow the rule,” id., at 655, or “severely shrink” it, Strate, 520 U. S., at 458. The Bank contends that neither exception authorizes tribal courts to exercise jurisdiction over the Longs’ discrimination claim at issue in this case. We agree.

According to our precedents, “a tribe’s adjudicative
jurisdiction does not exceed its legislative jurisdiction.”\textit{Id.}, at 453. We reaffirm that principle today and hold that the Tribal Court lacks jurisdiction to hear the Longs’ discrimination claim because the Tribe lacks the civil authority to regulate the Bank’s sale of its fee land.

The Longs’ discrimination claim challenges a non-Indian’s sale of non-Indian fee land. Despite the Longs’ attempt to recharacterize their claim as turning on the Bank’s alleged “failure to pay to respondents loans promised for cattle-raising on tribal trust land,” Brief for Respondents 47, in fact the Longs brought their discrimination claim “seeking to have the land sales set aside on the ground that the sale to nonmembers ‘on terms more favorable’ than the bank had extended to the Longs” violated tribal tort law, 491 F. 3d, at 882 (quoting Plaintiffs’ Amended Complaint, App. 173). See also Brief for United States as \textit{Amicus Curiae} 7. That discrimination claim thus concerned the sale of a 2,230-acre fee parcel that the Bank had acquired from the estate of a non-Indian.

The status of the land is relevant “insofar as it bears on the application of . . . Montana’s exceptions to [this] case.” \textit{Hicks}, 533 U. S., at 376 (SOUTER, J., concurring). The acres at issue here were alienated from the Cheyenne River Sioux’s tribal trust and converted into fee simple parcels as part of the Act of May 27, 1908, 35 Stat. 312, commonly called the 1908 Allotment Act. See Brief for Respondents 4, n. 2. While the General Allotment Act provided for the division of tribal land into fee simple parcels owned by individual tribal members, that Act also mandated that such allotments would be held in trust for their owners by the United States for a period of 25 years—or longer, at the President’s discretion—during which time the parcel owners had no authority to sell or convey the land. See 25 U. S. C. §348 (2000 ed., and Supp. V). The 1908 Act released particular Indian owners from these restrictions ahead of schedule, vesting in them full

The tribal tort law the Longs are attempting to enforce, however, operates as a restraint on alienation. It “set[s] limits on how nonmembers may engage in commercial transactions,” 491 F. 3d, at 887—and not just any transactions, but specifically nonmembers’ sale of fee lands they own. It regulates the substantive terms on which the Bank is able to offer its fee land for sale. Respondents and their principal amicus, the United States, acknowledge that the tribal tort at issue here is a form of regulation. See Brief for Respondents 52; Brief for United States as Amicus Curiae 25–26; see also Riegel v. Medtronic, Inc., 552 U. S. ___, ___ (2008) (slip op., at 11). They argue the regulation is fully authorized by the first Montana exception. They are mistaken.

Montana does not permit Indian tribes to regulate the sale of non-Indian fee land. Montana and its progeny permit tribal regulation of nonmember conduct inside the reservation that implicates the tribe’s sovereign interests. Montana expressly limits its first exception to the “activities of nonmembers,” 450 U. S., at 565, allowing these to be regulated to the extent necessary “to protect tribal self-government [and] to control internal relations,” id., at 564. See Big Horn Cty. Elect. Cooperative, Inc. v. Adams, 219 F. 3d 944, 951 (CA9 2000) (“Montana does not grant a tribe unlimited regulatory or adjudicative authority over a nonmember. Rather, Montana limits tribal jurisdiction under the first exception to the regulation of the activities of nonmembers” (internal quotations omitted; emphasis added)).
We cited four cases in explanation of *Montana*’s first exception. Each involved regulation of non-Indian activities on the reservation that had a discernable effect on the tribe or its members. The first concerned a tribal court’s jurisdiction over a contract dispute arising from the sale of merchandise by a non-Indian to an Indian on the reservation. See *Williams v. Lee*, 358 U. S. 217 (1959). The other three involved taxes on economic activity by nonmembers. See *Washington v. Confederated Tribes of Colville Reservation*, 447 U. S. 134, 152–153 (1980) (in cases where “the tribe has a significant interest in the subject matter,” tribes retain “authority to tax the activities or property of non-Indians taking place or situated on Indian lands”); *Morris v. Hitchcock*, 194 U. S. 384, 393 (1904) (upholding tribal taxes on nonmembers grazing cattle on Indian-owned fee land within tribal territory); *Buster v. Wright*, 135 F. 947, 950 (CA8 1905) (Creek Nation possessed power to levy a permit tax on nonmembers for the privilege of doing business within the reservation).

Our cases since *Montana* have followed the same pattern, permitting regulation of certain forms of nonmember conduct on tribal land. We have upheld as within the tribe’s sovereign authority the imposition of a severance tax on natural resources removed by nonmembers from tribal land. See *Merrion v. Jicarilla Apache Tribe*, 455 U. S. 130 (1982). We have approved tribal taxes imposed on leasehold interests held in tribal lands, as well as sales taxes imposed on nonmember businesses within the reservation. See *Kerr-McGee*, 471 U. S., at 196–197. We have similarly approved licensing requirements for hunting and fishing on tribal land. See *New Mexico v. Mescalero Apache Tribe*, 462 U. S. 324, 337 (1983).

Tellingly, with only “one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land.” *Hicks*, supra, at 360 (emphasis added). See *Atkinson*, 532 U. S., at 659
Opinion of the Court

(Tribe may not tax nonmember activity on non-Indian fee land); \textit{Strate}, 520 U. S., at 454, 457 (tribal court lacks jurisdiction over tort suit involving an accident on non-tribal land); \textit{Montana, supra}, at 566 (Tribe has no authority to regulate nonmember hunting and fishing on non-Indian fee land). The exception is \textit{Brendale v. Confederated Tribes and Bands of Yakima Nation}, 492 U. S. 408, and even it fits the general rubric noted above: In that case, we permitted a tribe to restrain particular uses of non-Indian fee land through zoning regulations. While a six-Judge majority held that \textit{Montana} did not authorize the Yakima Nation to impose zoning regulations on non-Indian fee land located in an area of the reservation where nearly half the acreage was owned by nonmembers, 492 U. S., at 430–431 (opinion of White, J.); \textit{id.}, at 444–447 (opinion of STEVENS, J.), five Justices concluded that \textit{Montana} did permit the Tribe to impose different zoning restrictions on nonmember fee land isolated in “the heart of [a] closed portion of the reservation,” 492 U. S., at 440 (opinion of STEVENS, J.), though the Court could not agree on a rationale, see \textit{id.}, at 443–444 (same); \textit{id.}, at 458–459 (opinion of Blackmun, J.).

But again, whether or not we have permitted regulation of nonmember activity on non-Indian fee land in a given case, in no case have we found that \textit{Montana} authorized a tribe to regulate the sale of such land. Rather, our \textit{Montana} cases have always concerned nonmember conduct on the land. See, \textit{e.g.}, \textit{Hicks}, 533 U. S., at 359 (\textit{Montana} and \textit{Strate} concern “tribal authority to regulate nonmembers’ activities on [fee] land” (emphasis added)); \textit{Atkinson}, 532 U. S., at 647 (“conduct of nonmembers on non-Indian fee land”); \textit{id.}, at 660 (SOUTER, J., concurring) (“the activities of nonmembers); \textit{Bourland}, 508 U. S., at 689 (“use of the land”); \textit{Brendale, supra}, at 430 (“use of fee land”); \textit{Montana, supra}, at 565 (first exception covers “activities of
nonmembers”).

The distinction between sale of the land and conduct on it is well-established in our precedent, as the foregoing cases demonstrate, and entirely logical given the limited nature of tribal sovereignty and the liberty interests of nonmembers. By virtue of their incorporation into the United States, the tribe’s sovereign interests are now confined to managing tribal land, see *Worcester*, 6 Pet., at 561 (persons are allowed to enter Indian land only “with the assent of the [tribal members] themselves”), “protect[ing] tribal self-government,” and “control[ling] internal relations,” see *Montana*, supra, at 564. The logic of *Montana* is that certain activities on non-Indian fee land (say, a business enterprise employing tribal members) or certain uses (say, commercial development) may intrude on the internal relations of the tribe or threaten tribal self-rule. To the extent they do, such activities or land uses may be regulated. See *Hicks*, supra, at 361 (“Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them”). Put another way, certain forms of nonmember behavior, even on non-Indian fee land, may sufficiently affect the tribe as to justify tribal oversight. While tribes generally have no interest in regulating the conduct of nonmembers, then, they may regulate nonmember behavior that implicates tribal governance and internal relations.

The regulations we have approved under *Montana* all flow directly from these limited sovereign interests. The

---

1 *JUSTICE GINSBURG* questions this distinction between sales and activities on the ground that “[s]ales of land—and related conduct—are surely ‘activities’ within the ordinary sense of the word.” *Post*, at 6. We think the distinction is readily understandable. In any event, the question is not whether a sale is, in some generic sense, an action. The question is whether land ownership and sale are “activities” within the meaning of *Montana* and the other cited precedents.
tribe’s “traditional and undisputed power to exclude persons” from tribal land, Duro, 495 U. S., at 696, for example, gives it the power to set conditions on entry to that land via licensing requirements and hunting regulations. See Bourland, supra, at 691, n. 11 (“Regulatory authority goes hand in hand with the power to exclude”). Much taxation can be justified on a similar basis. See Colville, 447 U. S., at 153 (taxing power “may be exercised over . . . nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions” (quoting Powers of Indian Tribes, 55 I. D. 14, 46 (1934; emphasis added). The power to tax certain nonmember activity can also be justified as “a necessary instrument of self-government and territorial management,” Merrion, 455 U. S., at 137, insofar as taxation “enables a tribal government to raise revenues for its essential services,” to pay its employees, to provide police protection, and in general to carry out the functions that keep peace and order, ibid.

JUSTICE GINSBURG wonders why these sorts of regulations are permissible under Montana but regulating the sale of fee land is not. See post, at 6–7. The reason is that regulation of the sale of non-Indian fee land, unlike the above, cannot be justified by reference to the tribe’s sovereign interests. By definition, fee land owned by nonmembers has already been removed from the tribe’s immediate control. See Strate, 520 U. S., at 456 (tribes lack power to “assert [over non-Indian fee land] a landowner’s right to occupy and exclude”). It has already been alienated from the tribal trust. The tribe cannot justify regulation of such land’s sale by reference to its power to superintend tribal land, then, because non-Indian fee parcels have ceased to be tribal land.

Nor can regulation of fee land sales be justified by the tribe’s interests in protecting internal relations and self-government. Any direct harm to its political integrity that
the tribe sustains as a result of fee land sale is sustained at the point the land passes from Indian to non-Indian hands. It is at that point the tribe and its members lose the ability to use the land for their purposes. Once the land has been sold in fee simple to non-Indians and passed beyond the tribe’s immediate control, the mere resale of that land works no additional intrusion on tribal relations or self-government. Resale, by itself, causes no additional damage.

This is not to suggest that the sale of the land will have no impact on the tribe. The uses to which the land is put may very well change from owner to owner, and those uses may well affect the tribe and its members. As our cases bear out, see supra, at 14–16, the tribe may quite legitimately seek to protect its members from noxious uses that threaten tribal welfare or security, or from nonmember conduct on the land that does the same. But the key point is that any threat to the tribe’s sovereign interests flows from changed uses or nonmember activities, rather than from the mere fact of resale. The tribe is able fully to vindicate its sovereign interests in protecting its members and preserving tribal self-government by regulating nonmember activity on the land, within the limits set forth in our cases. The tribe has no independent interest in restraining alienation of the land itself, and thus, no authority to do so.

Not only is regulation of fee land sale beyond the tribe’s sovereign powers, it runs the risk of subjecting nonmembers to tribal regulatory authority without commensurate consent. Tribal sovereignty, it should be remembered, is “a sovereignty outside the basic structure of the Constitution.” United States v. Lara, 541 U. S. 193, 212 (2004) (KENNEDY, J., concurring in judgment). The Bill of Rights does not apply to Indian tribes. See Talton v. Mayes, 163 U. S. 376, 382–385 (1896). Indian courts “differ from traditional American courts in a number of significant
respects.” *Hicks*, 533 U. S., at 383 (SOUTER, J., concurring). And nonmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe’s inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations. See *Montana*, 450 U. S., at 564.

In commenting on the policy goals Congress adopted with the General Allotment Act, we noted that “[t]here is simply no suggestion” in the history of the Act “that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority.” *Id.*, at 560, n. 9. In fact, we said it “defies common sense to suppose” that Congress meant to subject non-Indians to tribal jurisdiction simply by virtue of the nonmember’s purchase of land in fee simple. *Ibid.* If Congress did not anticipate tribal jurisdiction would run with the land, we see no reason why a nonmember would think so either.

The Longs point out that the Bank in this case could hardly have been surprised by the Tribe’s assertion of regulatory power over the parties’ business dealings. The Bank, after all, had “lengthy on-reservation commercial relationships with the Long Company.” Brief for Respondents 40. JUSTICE GINSBURG echoes this point. See *post*, at 4. But as we have emphasized repeatedly in this context, when it comes to tribal regulatory authority, it is not “in for a penny, in for a Pound.” *Atkinson*, 532 U. S., at 656 (internal quotation marks omitted). The Bank may reasonably have anticipated that its various commercial dealings with the Longs could trigger tribal authority to regulate those transactions—a question we need not and do not decide. But there is no reason the Bank should
have anticipated that its general business dealings with respondents would permit the Tribe to regulate the Bank’s sale of land it owned in fee simple.

Even the courts below recognized that the Longs’ discrimination claim was a “novel” one. 491 F. 3d, at 892. It arose “directly from Lakota tradition as embedded in Cheyenne River Sioux tradition and custom,” including the Lakota “sense of justice, fair play and decency to others.” 440 F. Supp. 2d, at 1082 (internal quotation marks omitted). The upshot was to require the Bank to offer the same terms of sale to a prospective buyer who had defaulted in several previous transactions with the Bank as it offered to a different buyer without such a history of default. This is surely not a typical regulation. But whatever the Bank anticipated, whatever “consensual relationship” may have been established through the Bank’s dealing with the Longs, the jurisdictional consequences of that relationship cannot extend to the Bank’s subsequent sale of its fee land.

The Longs acknowledge, if obliquely, the critical importance of land status. They emphasize that the Long Company “operated on reservation fee and trust lands,” Brief for Respondents 40, and n. 24, 41, and note that “the fee land at issue in the lease-repurchase agreement” had previously belonged to a tribal member, id., at 47. These facts, however, do not change the status of the land at the time of the challenged sale. Regardless of where the Long Company operated, the fee land whose sale the Longs seek to restrain was owned by the Bank at the relevant time. And indeed, before that, it was owned by Kenneth Long, a non-Indian. See Hicks, supra, at 382, n. 4 (SOUTER, J., concurring) (“Land status . . . might well have an impact under one (or perhaps both) of the Montana exceptions”), Atkinson, supra, at 659 (SOUTER, J., concurring) (status of territory as “tribal or fee land may have much to do (as it does here) with the likelihood (or not) that facts will exist
that are relevant under the [Montana] exceptions”).

The Longs attempt to salvage their position by arguing that the discrimination claim is best read to challenge the Bank’s whole course of commercial dealings with the Longs stretching back over a decade—not just the sale of the fee land. Brief for Respondents 44. That argument is unavailing. The Longs are the first to point out that their breach-of-contract and bad-faith claims, which do involve the Bank’s course of dealings, are not before this Court. Ibid. Only the discrimination claim is before us and that claim is tied specifically to the sale of the fee land. Ibid.

Count six of the Longs’ amended complaint in the Tribal Court alleges that “[i]n selling the Longs’ land, [Plains Commerce Bank] unfairly discriminated against the Company and the Longs.” App. 172–173 (emphasis added). As relief, the Longs claimed they “should get possession and title to their land back.” Id., at 173. The Longs’ discrimination claim, in short, is an attempt to regulate the terms on which the Bank may sell the land it owns.

Such regulation is outside the scope of a tribe’s sovereign authority. JUSTICE GINSBURG asserts that if “[t]he Federal Government and every State, county, and munici-

2 JUSTICE GINSBURG contends that if the Tribal Court has jurisdiction over the Longs’ other claims, it is hard to understand why jurisdiction would not also extend to the discrimination claim. Post, at 8. First, we have not said the Tribal Court has jurisdiction over the other claims: That question is not before us and we decline to speculate as to its answer. Moreover, the claims on which the Longs prevailed concern breach of a loan agreement, see App. 190, and bad faith in connection with Bureau of Indian Affairs loan guarantees, see id., at 192. The present claim involves substantive regulation of the sale of fee land.

3 We point to the relief requested by the Longs—and partially granted by the Tribal Court—to rebut the Longs’ contention that their claim did not focus on the sale of the fee land. Contrary to JUSTICE GINSBURG’s assertion, however, the nature of this remedy does not drive our jurisdictional ruling. See post, at 11–12. The remedy is invalid because there is no jurisdiction, not the other way around.
pality can make nondiscrimination the law governing . . . real property transactions,” tribes should be able to do so as well. Post, at 8. This argument completely overlooks the very reason cases like Montana and this one arise: Tribal jurisdiction, unlike the jurisdiction of the other governmental entities cited by JUSTICE GINSBURG, generally does not extend to nonmembers. See Montana, supra, at 565. The sovereign authority of Indian tribes is limited in ways state and federal authority is not. Contrary to JUSTICE GINSBURG’s suggestion, that bedrock principle does not vary depending on the desirability of a particular regulation.

Montana provides that, in certain circumstances, tribes may exercise authority over the conduct of nonmembers, even if that conduct takes place on non-Indian fee land. But conduct taking place on the land and the sale of the land are two very different things. The Cheyenne River Sioux Tribe lost the authority to restrain the sale of fee simple parcels inside their borders when the land was sold as part of the 1908 Allotment Act. Nothing in Montana gives it back.

C

Neither the District Court nor the Court of Appeals relied for its decision on the second Montana exception. The Eighth Circuit declined to address the exception’s applicability, see 491 F. 3d, at 888, n. 7, while the District Court strongly suggested in passing that the second exception would not apply here, see 440 F. Supp. 2d, at 1077. The District Court is correct, for the same reasons we explained above. The second Montana exception stems from the same sovereign interests that give rise to the first, interests that do not reach to regulating the sale of non-Indian fee land.

The second exception authorizes the tribe to exercise civil jurisdiction when non-Indians’ “conduct” menaces the
“political integrity, the economic security, or the health or welfare of the tribe.” *Montana*, 450 U. S., at 566. The conduct must do more than injure the tribe, it must “imperil the subsistence” of the tribal community. *Ibid*. One commentator has noted that “th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences.” Cohen §4.02[3][c], at 232, n. 220.

The sale of formerly Indian-owned fee land to a third party is quite possibly disappointing to the tribe, but cannot fairly be called “catastrophic” for tribal self-government. See *Strate*, 520 U. S., at 459. The land in question here has been owned by a non-Indian party for at least 50 years, Brief for Respondents 4, during which time the project of tribal self-government has proceeded without interruption. The land’s resale to another non-Indian hardly “imperil[s] the subsistence or welfare of the tribe.” *Montana, supra*, at 566. Accordingly, we hold the second *Montana* exception inapplicable in this case.

D

Finally, we address the Longs’ argument that the Bank consented to tribal court jurisdiction over the discrimination claim by seeking the assistance of tribal courts in serving a notice to quit. Brief for Respondents 44–46. When the Longs refused to vacate the land, the Bank initiated eviction proceedings in South Dakota state court. The Bank then asked the Tribal Court to appoint a process server able to reach the Longs. Seeking the Tribal Court’s aid in serving process on tribal members for a pending state-court action does not, we think, constitute consent to future litigation in the Tribal Court. Notably, when the Longs did file their complaint against the Bank in Tribal Court, the Bank promptly contended in its answer that the court lacked jurisdiction. Brief for United States as *Amicus Curiae* 7. Under these circumstances, we find that
the Bank did not consent by its litigation conduct to tribal
court jurisdiction over the Longs’ discrimination claim.

*   *   *

The judgment of the Court of Appeals for the Eighth
Circuit is reversed.

It is so ordered.
SEC. 207. The Federal Trade Commission Act (15 U.S.C. 41 et. seq.) is amended by inserting after section 19 the following new section:

"SEC. 20. There are authorized to be appropriated to carry out the functions, powers, and duties of the Federal Trade Commission not to exceed $49,000,000 for the fiscal year ending June 30, 1975; not to exceed $46,000,000 for the fiscal year ending June 30, 1976; and not to exceed $60,000,000 for the fiscal year ending in 1977. For fiscal years ending after 1977, there may be appropriated to carry out such functions, powers, and duties, only such sums as the Congress may hereafter authorize by law."

Approved January 4, 1975.

Public Law 93-638

AN ACT
To provide maximum Indian participation in the Government and education of the Indian people; to provide for the full participation of Indian tribes in programs and services conducted by the Federal Government for Indians; to encourage the development of human resources of the Indian people; to establish a program of assistance to upgrade Indian education; to support the right of Indian citizens to control their own educational activities; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Indian Self-Determination and Education Assistance Act".

CONGRESSIONAL FINDINGS

SEC. 3. (a) The Congress, after careful review of the Federal Government’s historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that—

(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

(b) The Congress further finds that—

(1) true self-determination in any society of people is dependent upon an educational process which will insure the development of qualified people to fulfill meaningful leadership roles;

(2) the Federal responsibility for and assistance to education of Indian children has not effected the desired level of educational achievement or created the diverse opportunities and personal satisfaction which education can and should provide; and

(3) parental and community control of the educational process is of crucial importance to the Indian people.

DECLARATION OF POLICY

SEC. 9. (a) The Congress hereby recognizes the obligation of the
United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of these communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

(c) The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

DEFINITIONS

SEC. 4. For the purposes of this Act, the term—

(a) "Indian" means a person who is a member of an Indian tribe;

(b) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 685) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;

(c) "Tribal organization" means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities; Provided, That in any case where a contract is let or grant made to an organization to perform services benelitting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant;

(d) "Secretary", unless otherwise designated, means the Secretary of the Interior;

(e) "State education agency" means the State board of education or other agency or officer primarily responsible for supervision by the State of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

REPORTING AND AUDIT REQUIREMENTS

SEC. 5. (a) Each recipient of Federal financial assistance from the Secretary of Interior or the Secretary of Health, Education, and Welfare, under this Act, shall keep such records as the appropriate Secretary shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such assistance, the cost of the project or undertaking in connection with which such assistance is given or used, the amount of that portion of the cost of the project or undertaking supplied by other sources, and
such other records as will facilitate an effective audit.

(b) The Comptroller General and the appropriate Secretary, or any of their duly authorized representatives, shall, until the expiration of three years after completion of the project or undertaking referred to in the preceding subsection of this section, have access (for the purpose of audit and examination) to any books, documents, papers, and records of such recipients which in the opinion of the Comptroller General or the appropriate Secretary may be related or pertinent to the grants, contracts, subcontracts, subgrants, or other arrangements referred to in the preceding subsection.

(c) Each recipient of Federal financial assistance referred to in subsection (a) of this section shall make such reports and information available to the Indian people served or represented by such recipient as and in a manner determined to be adequate by the appropriate Secretary.

(d) Any funds paid to a financial assistance recipient referred to in subsection (a) of this section and not expended or used for the purposes for which paid shall be repaid to the Treasury of the United States.

**Penalties**

Sec. 6. Whoever, being an officer, director, agent, or employee of, or connected in any capacity with, any recipient of a contract, subcontract, grant, or subgrant pursuant to this Act or the Act of April 16, 1934 (48 Stat. 596), as amended, embezzles, willfully misapplies, steals, or obtains by fraud any of the money, funds, assets, or property which are the subject of such a grant, subgrant, contract, or subcontract, shall be fined not more than $10,000 or imprisoned for not more than two years, or both, but if the amount so embezzled, misapplied, stolen, or obtained by fraud does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

**Wage and Labor Standards**

Sec. 7. (a) All laborers and mechanics employed by contractors of subcontractors in the construction, alteration, or repair, including painting or decorating of buildings or other facilities in connection with contracts or grants entered into pursuant to this Act, shall be paid wages at not less than those prevailing on similar construction in the locality, as determined by the Secretary of Labor in accordance with the Davis-Bacon Act of March 3, 1931 (46 Stat. 1444), as amended. With respect to construction, alteration, or repair work to which the Act of March 3, 1921 is applicable under the terms of this section, the Secretary of Labor shall have the authority and functions set forth in Reorganization Plan Numbered 11 of 1950 (15 F.R. 3176; 64 Stat. 1267) and section 2 of the Act of June 13, 1934 (48 Stat. 948, 40 U.S.C. 276c).

(b) Any contract, subcontract, grant, or subgrant pursuant to this Act, the Act of April 16, 1934 (48 Stat. 596), as amended, or any other Act authorizing Federal contracts or grants to Indian organizations or for the benefit of Indians, shall require that to the greatest extent feasible—

(1) preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians; and

(2) preference in the award of subcontracts and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 3 of the Indian Financing Act of 1974 (88 Stat. 77).
CARRYOVER OF FUNDS

Sec. 8. The provisions of any other laws to the contrary notwithstanding, any funds appropriated pursuant to the Act of November 2, 1921 (42 Stat. 208), for any fiscal year which are not obligated and expended prior to the beginning of the fiscal year succeeding the fiscal year for which such funds were appropriated shall remain available for obligation and expenditure during such succeeding fiscal year.

TITLE I—INDIAN SELF-DETERMINATION ACT

Sec. 101. This title may be cited as the “Indian Self-Determination Act”.

CONTRACTS BY THE SECRETARY OF THE INTERIOR

Sec. 102. (a) The Secretary of the Interior is directed, upon the request of any Indian tribe, to enter into a contract or contracts with any tribal organization of any such Indian tribe to plan, conduct, and administer programs, or portions thereof, provided for in the Act of April 16, 1934 (48 Stat. 550), as amended by this Act, any other program or portion thereof which the Secretary of the Interior is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208), and any Act subsequent thereto: Provided, however, That the Secretary may initially decline to enter into any contract requested by an Indian tribe if he finds that: (1) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory; (2) adequate protection of trust resources is not assured, or (3) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract: Provided further, That in arriving at his finding, the Secretary shall consider whether the tribe or tribal organization would be deficient in performance under the contract with respect to (A) equipment, (B) bookkeeping and accounting procedures, (C) substantive knowledge of the program to be contracted for, (D) community support for the contract, (E) adequately trained personnel, or (F) other necessary components of contract performance.

(b) Whenever the Secretary declines to enter into a contract or contracts pursuant to subsection (a) of this section, he shall (1) state his objections in writing to the tribe within sixty days, (2) provide to the extent practicable assistance to the tribe or tribal organization to overcome his stated objections, and (3) provide the tribe with a hearing, under such rules and regulations as he may promulgate, and the opportunity for appeal on the objections raised.

(c) The Secretary is authorized to require any tribe requesting that he enter into a contract pursuant to the provisions of this title to obtain adequate liability insurance: Provided, however, That each such policy of insurance shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the tribe’s sovereign immunity from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe’s sovereign immunity outside or beyond the coverage and limits of the policy of insurance.

CONTRACTS BY THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE

Sec. 103. (a) The Secretary of Health, Education, and Welfare is directed, upon the request of any Indian tribe, to enter into a contract or contracts with any tribal organization of any such Indian tribe to carry out any or all of his functions, authorities, and responsibilities
under the Act of August 5, 1954 (68 Stat. 671), as amended: Provided, however, That the Secretary may initially decline to enter into any contract requested by an Indian tribe if he finds that: (1) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted for will not be satisfactory; (2) adequate protection of trust resources is not assured; or (3) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract: Provided further, That the Secretary of Health, Education, and Welfare, in arriving at his finding, shall consider whether the tribe or tribal organization would be deficient in performance under the contract with respect to (A) equipment, (B) bookkeeping and accounting procedures, (C) substantive knowledge of the program to be contracted for, (D) community support for the contract, (E) adequately trained personnel, or (F) other necessary components of contract performance.

(b) Whenever the Secretary of Health, Education, and Welfare declines to enter into a contract or contracts pursuant to subsection (a) of this section, he shall (1) state his objections in writing to the tribe within sixty days; (2) provide, to the extent practicable, assistance to the tribe or tribal organization to overcome his stated objections; and (3) provide the tribe with a hearing, under such rules and regulations as he shall promulgate, and the opportunity for appeal on the objections raised.

(c) The Secretary of Health, Education, and Welfare is authorized to require any tribe requesting that he enter into a contract pursuant to the provisions of this title to obtain adequate liability insurance: Provided, however, That each such policy of insurance shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the tribe’s sovereign immunity from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe’s sovereign immunity outside or beyond the coverage and limits of the policy of insurance.

GRANTS TO INDIAN TRIBAL ORGANIZATIONS

Sec. 104. (a) The Secretary of the Interior is authorized, upon the request of any Indian tribe (from funds appropriated for the benefit of Indians pursuant to the Act of November 2, 1921 (42 Stat. 285), and any Act subsequent thereto) to contract with or make a grant to any tribal organization for—

(1) the strengthening or improvement of tribal government (including, but not limited to, the development, improvement, and administration of planning, financial management, or merit personnel systems; the improvement of tribally funded programs or activities; or the development, construction, improvement, maintenance, preservation, or operation of tribal facilities or resources);

(2) the planning, training, evaluation of other activities designed to improve the capacity of a tribal organization to enter into a contract or contracts pursuant to section 102 of this Act and the additional costs associated with the initial years of operation under such a contract or contracts;

(3) the acquisition of land in connection with items (1) and (2) above: Provided, That in the case of land within reservation boundaries or which adjoins on at least two sides lands held in trust by the United States for the tribe or for individual Indians, the Secretary of Interior may (upon request of the tribe) acquire such land in trust for the tribe; or
(4) the planning, designing, monitoring, and evaluating of Federal programs serving the tribe.
(b) The Secretary of Health, Education, and Welfare may, in accordance with regulations adopted pursuant to section 107 of this Act, make grants to any Indian tribe or tribal organization for—
(1) the development, construction, operation, provision, or maintenance of adequate health facilities or services including the training of personnel for such work, from funds appropriated to the Indian Health Service for Indian health services or Indian health facilities; or
(2) planning, training, evaluation or other activities designed to improve the capacity of a tribal organization to enter into a contract or contracts pursuant to section 103 of this Act.
(c) The provisions of any other Act notwithstanding, any funds made available to a tribal organization under grants pursuant to this section may be used as matching shares for any other Federal grant programs which contribute to the purposes for which grants under this section are made.

PERSONNEL.

Sec. 105. (a) Section 3371(2) of chapter 33 of title 5, United States Code, is amended (1) by deleting the word "and" immediately after the semicolon in clause (A); (2) by deleting the period at the end of clause (B) and inserting in lieu thereof a semicolon and the word "and"; and (3) by adding at the end thereof the following new clause:
"(C) any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village as defined in the Alaska Native Claims Settlement Act (88 Stat. 688), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians and includes any tribal organization as defined in section 4(e)(c) of the Indian Self-Determination and Education Assistance Act."

(b) The Act of August 5, 1954 (68 Stat. 671), as amended, is further amended by adding a new section 8 after section 7 of the Act, as follows:
"Sec. 8. In accordance with subsection (d) of section 214 of the Public Health Service Act (58 Stat. 690), as amended, upon the request of any Indian tribe, band, group, or community, commissioned officers of the Service may be assigned by the Secretary for the purpose of assisting such Indian tribe, group, band, or community in carrying out the provisions of this Act, if granted to, or tribal organizations pursuant to section 102, 103, or 104 of the Indian Self-Determination and Education Assistance Act."

(c) Paragraph (2) of subsection (a) of section 6 of the Military Selective Service Act of 1967 (81 Stat. 100), as amended, is amended by inserting after the words "Environmental Science Services Administration" the words "or who are assigned to assist Indian tribes, groups, bands, or communities pursuant to the Act of August 5, 1954 (68 Stat. 671), as amended."

(d) Section 502 of the Intergovernmental Personnel Act of 1970 (84 Stat. 1309, 1925) is amended—
(1) by deleting the word "and" after paragraph (3);
(2) by deleting the period after paragraph (4) and inserting in lieu thereof a semicolon and the word "and";
(3) by adding at the end thereof the following new paragraph:
"(5) Notwithstanding the population requirements of section 203(a) and 203(e) of this Act, a 'local government' and a 'general local government' also mean the recognized governing body of an Indian tribe, band, pueblo, or other organized group or com-
community, including any Alaska Native village, as defined in the Alaska Native Claims Settlement Act (85 Stat. 688), which performs substantial governmental functions. The requirements of sections 203(c) and 303(d) of this Act, relating to reviews by the Governor of a State, do not apply to grant applications from the governing body of an Indian tribe, although nothing in this Act is intended to discourage or prohibit voluntary communication and cooperation between Indian tribes and State and local governments."

(g) Notwithstanding any other law, executive order, or administrative regulation, an employee serving under an appointment not limited to one year or less who leaves Federal employment to be employed by a tribal organization on or before December 31, 1985, in connection with governmental or other activities which are or have been performed by employees in or for Indian communities is entitled, if the employee and the tribal organization so elect, to the following:

(1) To retain coverage, rights, and benefits under subchapter I of chapter 81 ("Compensation for Work Injuries") of title 5, United States Code, and for this purpose his employment with the tribal organization shall be deemed employment by the United States. However, if an injured employee, or his dependents in case of his death, receives from the tribal organization any payment (including an allowance, gratuity, payment under an insurance policy for which the premium is wholly paid by the tribal organization, or other benefit of any kind) on account of the same injury or death, the amount of that payment shall be credited against any benefit payable under subchapter I of chapter 81 of title 5, United States Code, as follows:

(A) payments on account of injury or disability shall be credited against disability compensation payable to the injured employee; and

(B) payments on account of death shall be credited against death compensation payable to dependents of the deceased employee.

(2) To retain coverage, rights, and benefits under chapter 83 ("Retirement") of title 5, United States Code, if necessary employee deductions and agency contributions in payment for coverage, rights, and benefits for the period of employment with the tribal organization are currently deposited in the Civil Service Retirement and Disability Fund (section 8348 of title 5, United States Code); and the period during which coverage, rights, and benefits are retained under this paragraph is deemed creditable service under section 8332 of title 5, United States Code. Days of unused sick leave to the credit of an employee under a formal leave system at the time the employee leaves Federal employment to be employed by a tribal organization remain to his credit for retirement purposes during covered service with the tribal organization.

(3) To retain coverage, rights, and benefits under chapter 89 ("Health Insurance") of title 5, United States Code, if necessary employee deductions and agency contributions in payment for the coverage, rights, and benefits for the period of employment with the tribal organization are currently deposited in the Employee's Health Benefit Fund (section 8908 of title 5, United States Code); and the period during which coverage, rights, and benefits are retained under this paragraph is deemed service as an employee under chapter 89 of title 5, United States Code.

(4) To retain coverage, rights, and benefits under chapter 87 ("Life Insurance") of title 5, United States Code, if necessary
employee deductions and agency contributions in payment for the coverage, rights, and benefits for the period of employment with the tribal organizations are currently deposited in the Employee's Life Insurance Fund (section 5714 of title 5, United States Code); and the period during which coverage, rights, and benefits are retained under this paragraph is deemed service as an employee under chapter 57 of title 5, United States Code.

(f) During the period an employee is entitled to the coverage, rights, and benefits pursuant to the preceding subsection, the tribal organization employing such employee shall deposit currently in the appropriate funds the employee deductions and agency contributions required by paragraphs (2), (3), and (4) of such preceding subsection.

(g) An employee who is employed by a tribal organization under subsection (e) of this section and such tribal organization shall make the election to retain the coverages, rights, and benefits in paragraphs (1), (2), (3), and (4) of such subsection (e) before the date of his employment by a tribal organization. An employee who is employed by a tribal organization under subsection (e) of this section shall continue to be entitled to the benefits of such subsection if he is employed by another tribal organization to perform service in activities of the type described in such subsection.

(h) For the purposes of subsections (e), (f), and (g) of this section, the term "employee" means an employee as defined in section 2105 of title 5, United States Code.

(i) The President may prescribe regulations necessary to carry out the provisions of subsections (e), (f), (g), and (h) of this section and to protect and assure the compensation, retirement, insurance, leave, reemployment rights, and such other similar civil service employment rights as he finds appropriate.

(j) Anything in sections 205 and 207 of title 18, United States Code to the contrary notwithstanding, officers and employees of the United States assigned to an Indian tribe as authorized under section 3372 of title 5, United States Code, or section 2072 of the Revised Statutes (25 U.S.C. 48) and former officers and employees of the United States employed by Indian tribes may act as agents or attorneys for or appear on behalf of such tribes in connection with any matter pending before any department, agency, court, or commission, including any matter in which the United States is a party or has a direct and substantial interest: Provided, That each such officer or employee or former officer or employee must advise in writing the head of the department, agency, court, or commission with which he is dealing or appearing on behalf of the tribe of any personal and substantial involvement he may have had as an officer or employee of the United States in connection with the matter involved.

ADMINISTRATIVE PROVISIONS

25 USC 450.

Sec. 106. (a) Contracts with tribal organizations pursuant to sections 102 and 103 of this Act shall be in accordance with all Federal contracting laws and regulations except that, in the discretion of the appropriate Secretary, such contracts may be negotiated without advertising and need not conform with the provisions of the Act of August 21, 1935 (49 Stat. 793), as amended: Provided, That the appropriate Secretary may waive any provisions of such contracting laws or regulations which he determines are not appropriate for the purpose of the contract involved or inconsistent with the provisions of this Act.

(b) Payments of any grants or under any contracts pursuant to section 102, 103, or 104 of this Act may be made in advance or by way of reimbursement and in such installments and on such conditions as
the appropriate Secretary deems necessary to carry out the purposes of this title. The transfer of funds shall be scheduled consistent with program requirements and applicable Treasury regulations, so as to minimize the time elapsing between the transfer of such funds from the United States Treasury and the disbursement thereof by the tribal organization, whether such disbursement occurs prior to or subsequent to such transfer of funds. Tribal organizations shall not be held accountable for interest earned on such funds, pending their disbursement by such organization.

(c) Any contract requested by a tribe pursuant to sections 102 and 103 of this Act shall be for a term not to exceed one year unless the appropriate Secretary determines that a longer term would be advisable: Provided, That such term may not exceed three years and shall be subject to the availability of appropriations: Provided, further, That the amounts of such contracts may be renegotiated annually to reflect factors, including but not limited to cost increases beyond the control of a tribal organization.

(d) Notwithstanding any provision of law to the contrary, the appropriate Secretary may, at the request or consent of a tribal organization, revise or amend any contract or grant made by him pursuant to section 102, 103, or 104 of this Act with such organization as necessary to carry out the purposes of this title: Provided, however, That whenever an Indian tribe requests retrocession of the appropriate Secretary for any contract entered into pursuant to this Act, such retrocession shall become effective upon a date specified by the appropriate Secretary not more than one hundred and twenty days from the date of the request by the tribe or at such later date as may be mutually agreed to by the appropriate Secretary and the tribe.

(e) In connection with any contract or grant made pursuant to section 102, 103, or 104 of this Act, the appropriate Secretary may permit a tribal organization to utilize, in carrying out such contract or grant, existing school buildings, hospitals, and other facilities and all equipment therein or appertaining thereto and other personal property owned by the Government within his jurisdiction under such terms and conditions as may be agreed upon for their use and maintenance.

(f) The contracts authorized under sections 102 and 103 of this Act and grants pursuant to section 104 of this Act may include provisions for the performance of personal services which would otherwise be performed by Federal employees including, but in no way limited to, functions such as determination of eligibility of applicants for assistance, benefits, or services, and the extent or amount of such assistance, benefits, or services to be provided and the provisions of such assistance, benefits, or services, all in accordance with the terms of the contract or grant and applicable rules and regulations of the appropriate Secretary: Provided, That the Secretary shall not make any contract which would impair his ability to discharge his trust responsibilities to any Indian tribe or individuals.

(g) Contracts and grants with tribal organizations pursuant to sections 102, 103, and 104 of this Act and the rules and regulations adopted by the Secretaries of the Interior and Health, Education, and Welfare pursuant to section 107 of this Act shall include provisions to assure the fair and uniform provision by such tribal organizations of the services and assistance they provide to Indians under such contracts and grants.

(h) The amount of funds provided under the terms of contracts entered into pursuant to sections 102 and 103 shall not be less than the appropriate Secretary would have otherwise provided for his direct operation of the programs or portions thereof for the period covered by the contract: Provided, That any savings in operation under such
contracts shall be utilized to provide additional services or benefits under the contract.

PROCLAMATION OF RULES AND REGULATIONS

Sec. 107. (a) The Secretaries of the Interior and of Health, Education, and Welfare are each authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purposes of carrying out the provisions of this title.

(b) (1) Within six months from the date of enactment of this Act, the Secretary of the Interior and the Secretary of Health, Education, and Welfare shall each to the extent practicable, consult with national and regional Indian organizations to consider and formulate appropriate rules and regulations to implement the provisions of this title.

(2) Within seven months from the date of enactment of this Act, the Secretary of the Interior and the Secretary of Health, Education, and Welfare shall each present the proposed rules and regulations to the Committees on Interior and Insular Affairs of the United States Senate and House of Representatives.

(3) Within eight months from the date of enactment of this Act, the Secretary of the Interior and the Secretary of Health, Education, and Welfare shall publish proposed rules and regulations in the Federal Register for the purpose of receiving comments from interested parties.

(4) Within ten months from the date of enactment of this Act, the Secretary of the Interior and the Secretary of Health, Education, and Welfare shall promulgate rules and regulations to implement the provisions of this title.

(c) The Secretary of the Interior and the Secretary of Health, Education, and Welfare are authorized to revise and amend any rules or regulations promulgated pursuant to this section: Provided, That prior to any revision or amendment to such rules or regulations, the respective Secretary or Secretaries shall present the proposed revision or amendment to the Committees on Interior and Insular Affairs of the United States Senate and House of Representatives and shall, to the extent practicable, consult with appropriate national or regional Indian organizations and shall publish any proposed revisions in the Federal Register not less than sixty days prior to the effective date of such rules and regulations in order to provide adequate notice to, and receive comments from, other interested parties.

REPORTS

Sec. 108. For each fiscal year during which an Indian tribal organization receives or expends funds pursuant to a contract or grant under this title, the Indian tribe which requested such contract or grant shall submit to the appropriate Secretary a report including, but not limited to, an accounting of the amounts and purposes for which Federal funds were expended, information on the conduct of the program or service involved, and such other information as the appropriate Secretary may request.

REASSUMPTION OF PROGRAMS

Sec. 109. Each contract or grant agreement entered into pursuant to sections 102, 103, and 104 of this Act and which the appropriate Secretary determines that the tribal organization's performance under such contract or grant agreement involves (1) the violation of the rights or endangerment of the health, safety, or welfare of any persons; or (2) gross negligence or mismanagement
in the handling or use of funds provided to the tribal organization pursuant to such contract or grant agreement, such Secretary may, under regulations prescribed by him and after providing notice and hearing to such tribal organization, rescind such contract or grant agreement and assume or resume control or operation of the program, activity, or service involved if he determines that the tribal organization has not taken corrective action as prescribed by him: Provided, That the appropriate Secretary may, upon notice to a tribal organization, immediately rescind a contract or grant and resume control or operation of a program, activity, or service if he finds that there is an immediate threat to safety and, in such cases, shall hold a hearing on such action within ten days thereof. Such Secretary may decline to enter into a new contract or grant agreement and retain control of such program, activity, or service until such time as he is satisfied that the violations of rights or endangerment of health, safety, or welfare which necessitated the rescission has been corrected. Nothing in this section shall be construed as contravening the Occupational Safety and Health Act of 1970 (84 Stat. 1590), as amended (29 U.S.C. 651).

EFFECT ON EXISTING RIGHTS

Sec. 110. Nothing in this Act shall be construed as—

(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or

(2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.

TITLE II—THE INDIAN EDUCATION ASSISTANCE ACT

Sec. 201. This title may be cited as the "Indian Education Assistance Act".

PART A—EDUCATION OF INDIANS IN PUBLIC SCHOOLS

Sec. 203. The Act of April 16, 1934 (48 Stat. 596), as amended, is further amended by adding at the end thereof the following new sections:

"Sec. 4. The Secretary of the Interior shall not enter into any contract for the education of Indians unless the prospective contractor has submitted to, and has had approved by the Secretary of the Interior, an education plan, which plan, in the determination of the Secretary, contains educational objectives which adequately address the educational needs of the Indian students who are to be beneficiaries of the contract and assures that the contract is capable of meeting such objectives: Provided, That where students other than Indian students participate in such programs, money expended under such contract shall be prorated to cover the participation of only the Indian students.

"Sec. 5. (a) Whenever a school district affected by a contract or contracts for the education of Indians pursuant to this Act has a local school board not composed of a majority of Indians, the parents of the Indian children enrolled in the school or schools affected by such contract or contracts shall elect a local committee from among their number. Such committee shall fully participate in the development of, and shall have the authority to approve or disapprove programs to be conducted under such contract or contracts, and shall carry out such other duties, and be so structured, as the Secretary of the Interior shall by regulation provide: Provided, however, That, whenever a local Indian committee or committees established pursuant to section 305 (b) (2) (B) (ii) of the Act of June 23, 1972 (86 Stat. 235) or an Indian advisory school board or boards established pursuant to this Act prior
to the date of enactment of this section exists in such school district, such committee or board may, in the discretion of the affected tribal governing body or bodies, be utilized for the purposes of this section.

(b) The Secretary of the Interior may, in his discretion, revoke any contract if the contractor fails to permit a local committee to perform its duties pursuant to subsection (a).

Sec. 6. Any school district educating Indian students who are members of recognized Indian tribes, who do not normally reside in the State in which such school district is located, and who are residing in Federal boarding facilities for the purposes of attending public schools within such district may, in the discretion of the Secretary of the Interior, be reimbursed by him for the full per capita costs of educating such Indian students.

Sec. 203. After conferring with persons competent in the field of Indian education, the Secretary, in consultation with the Secretary of Health, Education, and Welfare, shall prepare and submit to the Committees on Interior and Insular Affairs of the United States Senate and House of Representatives not later than October 1, 1975, a report which shall include:

(1) a comprehensive analysis of the Act of April 16, 1934 (48 Stat. 596), as amended, including—
(A) factors determining the allocation of funds for the special or supplemental educational programs of Indian students and current operating expenditures;
(B) the relationship of the Act of April 16, 1934 (48 Stat. 596), as amended, to—
(i) title I of the Act of September 30, 1950 (64 Stat. 1100), as amended; and
(ii) the Act of April 11, 1965 (79 Stat. 27), as amended; and
(iii) title IV of the Act of June 23, 1972 (86 Stat. 223); and
(iv) the Act of September 23, 1950 (73 Stat. 548), as amended.

(2) a specific program to meet the special educational needs of Indian children who attend public schools. Such program shall include, but need not be limited to, the following:
(A) a plan for the equitable distribution of funds to meet the special or supplemental educational needs of Indian children and, where necessary, to provide general operating expenditures to schools and school districts educating Indian children; and
(B) an estimate of the cost of such program;

(3) detailed legislative recommendations to implement the program prepared pursuant to clause (2); and

(4) a specific program, together with detailed legislative recommendations, to assist the development and administration of Indian-controlled community colleges.

PART B—SCHOOL CONSTRUCTION

Sec. 204. (a) The Secretary is authorized to enter into a contract or contracts with any State education agency or school district for the purpose of assisting such agency or district in the acquisition of sites for, or the construction, acquisition, or renovation of facilities (including all necessary equipment) in school districts on or adjacent to or in close proximity to any Indian reservation or other lands held in trust by the United States for Indians, if such facilities are necessary for the education of Indians residing on any such reservation or lands.
(b) The Secretary may expend not less than 75 per centum of such funds as are authorized and appropriated pursuant to this part B on those projects which meet the eligibility requirements under subsections (a) and (b) of section 14 of the Act of September 23, 1950 (72 Stat. 548), as amended. Such funds shall be allocated on the basis of existing funding priorities, if any, established by the United States Commissioner of Education under subsections (a) and (b) of section 14 of the Act of September 23, 1950, as amended. The United States Commissioner of Education is directed to submit to the Secretary, at the beginning of each fiscal year, commencing with the first full fiscal year after the date of enactment of this Act, a list of those projects eligible for funding under subsections (a) and (b) of section 14 of the Act of September 23, 1950, as amended.

(c) The Secretary may expend not more than 25 per centum of such funds as may be authorized and appropriated pursuant to this part B on any school eligible to receive funds under section 208 of this Act.

(d) Any contract entered into by the Secretary pursuant to this section shall contain provisions requiring the relevant State educational agency to—

1. provide Indian students attending any such facilities constructed, acquired, or renovated, in whole or in part, from funds made available pursuant to this section with standards of education not less than those provided non-Indian students in the school district in which the facilities are situated; and
2. meet, with respect to such facilities, the requirements of the State and local building codes, and other building standards set by the State educational agency or school district for other public school facilities under its jurisdiction or control or by the local government in the jurisdiction within which the facilities are situated.

(e) The Secretary shall consult with the entity designated pursuant to section 5 of the Act of April 16, 1934 (48 Stat. 595), as amended by this Act, and with the governing body of any Indian tribe or tribes the educational opportunity for the members of which will be significantly affected by any contract entered into pursuant to this section. Such consultation shall be advisory only, but shall occur prior to the entering into of any such contract. The foregoing provisions of this subsection shall not be applicable where the application for a contract pursuant to this section is submitted by an elected school board of which a majority of its members are Indians.

(f) Within ninety days following the expiration of the three year period following the date of the enactment of this Act, the Secretary shall evaluate the effectiveness of the program pursuant to this section and transmit a report of such evaluation to the Congress. Such report shall include—

1. an analysis of construction costs and the impact on such costs of the provisions of subsection (f) of this section and the Act of March 3, 1931 (46 Stat. 1491), as amended;
2. a description of the working relationship between the Department of the Interior and the Department of Health, Education, and Welfare including any memorandum of understanding in connection with the acquisition of data pursuant to subsection (b) of this section;
3. projections of the Secretary of future construction needs of the public schools serving Indian children residing on or adjacent to Indian reservations;
(4) a description of the working relationship of the Department of the Interior with local or State educational agencies in connection with the contracting for construction, acquisition, or renovation of school facilities pursuant to this section; and

(5) the recommendations of the Secretary with respect to the transfer of the responsibility for administering subsections (a) and (b) of section 14 of the Act of September 23, 1950 (72 Stat. 548), as amended, from the Department of Health, Education, and Welfare to the Department of the Interior.

(g) For the purpose of carrying out the provisions of this section, there is authorized to be appropriated the sum of $35,000,000 for the fiscal year ending June 30, 1974; $35,000,000 for each of the four succeeding fiscal years; and thereafter, such sums as may be necessary, all of such sums to remain available until expended.

PART C—GENERAL PROVISIONS

Sec. 205. No funds from any grant or contract pursuant to this title shall be made available to any school district unless the Secretary is satisfied that the quality and standard of education, including facilities and auxiliary services, for Indian students enrolled in the schools of such district are at least equal to that provided all other students from resources, other than resources provided in this title, available to the local school district.

Sec. 206. No funds from any contract or grant pursuant to this title shall be made available by any Federal agency directly to other than public agencies and Indian tribes, institutions, and organizations: Provided, That school districts, State education agencies, and Indian tribes, institutions, and organizations assisted by this title may use funds provided herein to contract for necessary services with any appropriate individual, organization, or corporation.

Sec. 207. (a) (1) Within six months from the date of enactment of this Act, the Secretary shall, to the extent practicable, consult with national and regional Indian organizations with experiences in Indian education to consider and formulate appropriate rules and regulations to implement the provisions of this title.

(2) Within seven months from the date of enactment of this Act, the Secretary shall present the proposed rules and regulations to the Committees on Interior and Insular Affairs of the United States Senate and House of Representatives.

(3) Within eight months from the date of enactment of this Act, the Secretary shall publish proposed rules and regulations in the Federal Register for the purpose of receiving comments from interested parties.

(4) Within ten months from the date of enactment of this Act, the Secretary shall promulgate rules and regulations to implement the provisions of this title.

(b) The Secretary is authorized to revise and amend any rules or regulations promulgated pursuant to subsection (a) of this section: Provided, That prior to any revision or amendment to such rules or regulations the Secretary shall, to the extent practicable, consult with appropriate national and regional Indian organizations, and shall publish any proposed revisions in the Federal Register not less than sixty days prior to the effective date of such rules and regulations in order to provide adequate notice to, and receive comments from, other interested parties.

Sec. 208. The Secretary is authorized and directed to provide funds, pursuant to this Act; the Act of April 30, 1934 (48 Stat. 586), as amended; or any other authority granted to him to any tribe or tribal organization which controls and manages any previously private
school. The Secretary shall transmit annually to the Committees on Interior and Insular Affairs of the United States Senate and House of Representatives a report on the educational assistance program conducted pursuant to this section.

Sec. 200. The assistance provided in this Act for the education of Indians in the public schools of any State is in addition and supplemental to assistance provided under title IV of the Act of June 23, 1972 (86 Stat. 285).

Approved January 4, 1975.

Public Law 93-639

AN ACT

To amend certain provisions of Federal law relating to explosives.

January 4, 1975

18 USC 845

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as "Amendments of 1973 to Federal Law Relating to Explosives".

Sec. 101. Section 845(a) of title 18 of the United States Code (relating to exemptions from certain provisions of Federal law relating to explosives) is amended by striking out paragraph (5) and inserting in lieu thereof the following new paragraph:

"(5) commercially manufactured black powder in quantities not to exceed fifty pounds, percussion caps, safety and pyrotechnic fuses, quills, quick and slow matches, and friction primers, intended to be used solely for sporting, recreational, or cultural purposes in antique firearms as defined in section 921(a)(16) of title 18 of the United States Code, or in antique devices as exempted from the term "destructive device" in section 921(a)(4) of title 18 of the United States Code; and"

Sec. 102. Section 921(a)(4) of title 18 of the United States Code is amended by inserting after the word "sporting" in the last sentence the following: "recreational or cultural".

Approved January 4, 1975.

Public Law 93-640

AN ACT

To amend the Public Health Service Act to expand the authority of the National Institute of Arthritis, Metabolism, and Digestive Diseases in order to advance a national attack on arthritis.

January 4, 1975


Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

Section 1. This Act may be cited as the "National Arthritis Act of 1974".

FINDINGS AND DECLARATION OF PURPOSE

Sec. 2. The Congress makes the following findings—

(1) Arthritis and related musculoskeletal diseases constitute major health problems in the United States in that they affect more than twenty million Americans and are the greatest single cause of chronic pain and disability.

(2) The complications of arthritis lead to many other serious
One Hundred Thirteenth Congress
of the
United States of America

AT THE FIRST SESSION

Began and held at the City of Washington on Thursday,
the third day of January, two thousand and thirteen

An Act


Be it enacted by the Senate and House of Representatives of
the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Violence Against Women
Reauthorization Act of 2013".

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

Sec. 1. Short title.
Sec. 2. Table of contents.
Sec. 3. Universal definitions and grant conditions.
Sec. 4. Effective date.

TITLE I—ENHANCING JUDICIAL AND LAW ENFORCEMENT TOOLS TO
COMBAT VIOLENCE AGAINST WOMEN

Sec. 101. State grants.
Sec. 102. Grants to encourage arrest policies and enforcement of protection orders.
Sec. 103. Legal assistance for victims.
Sec. 104. Mediation programs to support families in the justice system.
Sec. 105. Sex offender management.
Sec. 106. Court-appointed special advocate program.
Sec. 107. Criminal provisions relating to stalking, including cyberstalking.
Sec. 108. Victim services to underserved population grant.
Sec. 109. Culturally specific services grant.

TITLE II—IMPROVING SERVICES FOR VICTIMS OF DOMESTIC VIOLENCE,
DATING VIOLENCE, SEXUAL ASSAULT, AND STALKING

Sec. 201. Sexual assault services program.
Sec. 202. Rural domestic violence, dating violence, sexual assault, stalking, and
child abuse enforcement assistance.
Sec. 203. Training and services to end violence against women with disabilities.
Sec. 204. Enhanced training and services to end abuse in later life.

TITLE III—SERVICES, PROTECTION, AND JUSTICE FOR YOUNG VICTIMS OF
VIOLENCE

Sec. 301. Raps prevention and education grant.
Sec. 302. Creating links through outreach, options, services, and education for children
and youth.
Sec. 303. Grants to combat violent crimes on campuses.
Sec. 304. Campus sexual violence, domestic violence, dating violence, and stalking
education and prevention.

TITLE IV—VIOLENCE PREVENTION AND EDUCATION

Sec. 401. Study conducted by the caucus for domestic violence and prevention.
462. Saving money and reducing tragedies through prevention grants.

**Title V—Strengthening the Healthcare System's Response to Domestic Violence, Dating Violence, Sexual Assault, and Stalking**

Sec. 461. Consolidation of grants to strengthen the healthcare system's response to domestic violence, dating violence, sexual assault, and stalking.

**Title VI—Safe Homes for Victims of Domestic Violence, Dating Violence, Sexual Assault, and Stalking**

Sec. 461. Housing protections for victims of domestic violence, dating violence, sexual assault, and stalking.

Sec. 462. Transitional housing assistance grants for victims of domestic violence, dating violence, sexual assault, and stalking.

Sec. 463. Addressing the housing needs of victims of domestic violence, dating violence, sexual assault, and stalking.

**Title VII—Economic Security for Victims of Violence**

Sec. 461. National Resource Center on Workforce Response to assist victims of domestic and sexual violence.

**Title VIII—Protection of Battered Immigrants**

Sec. 461. Protection of battered status.

Sec. 462. Joint report to immigration applications made by victims of abuse.

Sec. 463. Protection of children of battered immigrants.

Sec. 464. Public notice.

Sec. 465. Requirements applicable to U visas.

Sec. 466. Employment services.

Sec. 467. Protection for a fiancé or fiancée of a citizen.

Sec. 468. Protection of international marriage brokers.

Sec. 469. Eligibility of visas and trafficking victims in the Commonwealth of the Northern Mariana Islands to adjust status.

Sec. 4610. Disclosure of information for national security purposes.

**Title IX—Safety for Indian Women**

Sec. 461. Grants to Indian tribal governments.

Sec. 462. Grants to Indian tribal coalitions.

Sec. 463. Consultation.

Sec. 464. Tribal jurisdiction over crimes of domestic violence.

Sec. 465. Tribal protective orders.

Sec. 466. Amendments to the Federal Offender statute.

Sec. 467. Analysis and research on violence against Indian women.

Sec. 468. Effective family court processes.

Sec. 469. Indian law and Indian commission; Report on the Alaska Native Justice and Law Enforcement Commission.

Sec. 4610. Special rules for the State of Alaska.

**Title X—Safe Act**

Sec. 461. Title I.

Sec. 462. Title II; grants for reducing sexual assault evidence backlog.

Sec. 463. Title III; reports to Congress.

Sec. 464. Title IV; reducing the rape kit backlog.

Sec. 465. Title V; oversight and accountability.

Sec. 466. Title VI; sunset.

**Title XI—Other Matters**

Sec. 461. Sexual abuse in institutional settings.

Sec. 462. Anonymous online harassment.

Sec. 463. Falter database.

Sec. 464. Federal victim assistance reauthorization.

Sec. 465. Child abuse training programs for judicial personnel and practitioners reauthorization.

**Title XII—Trafficking Victims Protection**

Subtitle A—Combating International Trafficking in Persons

Sec. 461. Regional strategies for combating trafficking in persons.

Sec. 462. Partnerships against significant trafficking in persons.

Sec. 463. Protection and assistance for victims of trafficking.
Sec. 1504. Minimum standards for the elimination of trafficking.
Sec. 1506. Best practices in trafficking in persons enforcement.
Sec. 1507. Protections for domestic workers and other nonimmigrants.
Sec. 1507. Prevention of child marriages.
Sec. 1508. Child labor.

Subtitle B—Combating Trafficking in Persons in the United States

PART I—PENALTIES AGAINST TRAFFICKERS AND OTHER CRIMES

Sec. 1501. Criminal trafficking offenses.
Sec. 1502. Civil remedies; clarifying definitions.

PART II—ENSURING AVAILABILITY OF POSSIBLE WITNESSES AND INFORMANTS

Sec. 1503. Protections for trafficking victims who cooperate with law enforcement.
Sec. 1504. Protections against fraud in foreign labor contracting.

PART III—ENSURING INTERAGENCY COORDINATION AND ENHANCED REPORTING

Sec. 1505. Reporting requirements for the Attorney General.
Sec. 1506. Reporting requirements for the Secretary of Labor.
Sec. 1507. Information sharing to combat child labor and slave labor.
Sec. 1508. Government training efforts to include the Department of Labor.
Sec. 1509. GAO report on the use of foreign labor contractors.
Sec. 1510. Accountability.

PART IV—ENHANCING STATE AND LOCAL EFFORTS TO COMBAT TRAFFICKING IN PERSONS

Sec. 1511. Assistance for domestic minor sex trafficking victims.
Sec. 1512. Expanding local law enforcement grants for investigations and prosecution of trafficking.
Sec. 1513. Model State criminal law protection for child trafficking victims and survivors.

Subtitle C—Authorization of Appropriations


Subtitle D—Unaccompanied Alien Children

Sec. 1517. Appropriate custodial settings for unaccompanied minors who reach the age of majority while in Federal custody.
Sec. 1518. Appointments of child advocates for unaccompanied minors.
Sec. 1519. Access to Federal foster care and unaccompanied minor protections for certain V Visa recipients.
Sec. 1520. GAO study of the effectiveness of border screenings.

SBC 5. UNIVERSAL DEFINITIONS AND GRANT CONDITIONS.

(a) DEFINITIONS.—Subsection (a) of section 40002 of the Violence Against Women Act of 1994 (42 U.S.C. 13956a) is amended—

(1) by striking paragraphs (5), (17), (18), (22), (25), (33), (36), and (57); and
(2) by redesignating—
(A) paragraphs (34) and (35) as paragraphs (41) and (42), respectively;
(B) paragraphs (36), (37), and (38) as paragraphs (36), (37), and (38), respectively;
(C) paragraphs (24) through (28) as paragraphs (30) through (34), respectively;
(D) paragraphs (21) and (22) as paragraphs (26) and (27), respectively;
(E) paragraphs (10) and (20) as paragraphs (29) and (34), respectively;
(F) paragraphs (10) through (16) as paragraphs (13) through (19), respectively;
(B) paragraphs (6), (7), (8), and (9) as paragraphs (8), (9), (10), and (11), respectively; and
(C) paragraphs (1), (2), (3), and (4) as paragraphs (2), (3), (4), and (5), respectively;
(3) by inserting before paragraph (2), as redesignated, the following:

"(1) ALASKA NATIVE VILLAGE.—The term 'Alaska Native village' has the same meaning given such term in the Alaska Native Claims Settlement Act (43 U.S.C. 161 et seq.)."
(4) in paragraph (3), as redesignated, by striking "serious harm," and inserting "serious harm to an unemancipated minor";
(5) in paragraph (4), as redesignated, by striking "The term" through "(1)" and inserting "The term 'community-based organization' means a nonprofit, nongovernmental, or tribal organization that serves a specific geographic community that—"
(6) by inserting after paragraph (5), as redesignated, the following:

"(6) CULTURALLY SPECIFIC.—The term 'culturally specific' means primarily directed toward racial and ethnic minority groups (as defined in section 1707(g) of the Public Health Service Act (42 U.S.C. 200a-4(g))."
(7) in paragraph (6), as redesignated, by inserting "or intimate partner" after "former spouse" and "as a spouse";
(8) by inserting after paragraph (11), as redesignated, the following:

"(12) HOMELESS.—The term 'homeless' has the meaning provided in section 41403(b)(1)."
(9) in paragraph (18), as redesignated, by inserting "or Village Public Safety Officers after "governmental victim services programs";
(10) in paragraph (19), as redesignated, by inserting at the end the following: "Intake or referral, by itself, does not constitute legal assistance;"
(11) by inserting after paragraph (19), as redesignated, the following:

"(20) PERSONALLY IDENTIFYING INFORMATION OR PERSONAL INFORMATION.—The term 'personally identifying information' or 'personal information' means individually identifying information for or about an individual including information likely to disclose the location of a victim of domestic violence, dating violence, sexual assault, or stalking, regardless of whether the information is encoded, encrypted, hashed, or otherwise protected, including—
(A) a first and last name;
(B) a home or other physical address;
(C) contact information (including a postal, e-mail or Internet protocol address, or telephone or facsimile number);
(D) a social security number, driver license number, passport number, or student identification number; and
S. 47—5

"(B) any other information, including date of birth, racial or ethnic background, or religious affiliation, that would serve to identify any individual.

"(C)(1) POPULATION SPECIFIC ORGANIZATION.—The term ‘population specific organization’ means a nonprofit, nongovernmental organization that primarily serves members of a specific underserved population and has demonstrated experience and expertise providing targeted services to members of that specific underserved population.

"(C)(2) POPULATION SPECIFIC SERVICES.—The term ‘population specific services’ means victim-centered services that address the safety, health, economic, legal, housing, workplace, immigration, confidentiality, or other needs of victims of domestic violence, dating violence, sexual assault, or stalking, and that are designed primarily for and are targeted to a specific underserved population;"

(33) in paragraph (23), as redesignated, by striking "services" and inserting "assistance";

(35) by inserting after paragraph (24), as redesignated, the following:

"(28) RAPE CRISIS CENTER.—The term ‘rape crisis center’ means a nonprofit, nongovernmental, or tribal organization, or governmental entity in a State other than a Territory that provides intervention and related assistance, as specified in section 41691(b)(2)(C), to victims of sexual assault without regard to their age. In the case of a governmental entity, the entity may not be part of the criminal justice system (such as a law enforcement agency) and must be able to offer a comparable level of confidentiality as a nonprofit entity that provides similar victim services.

(44) in paragraph (25), as redesignated—

(A) in subparagraph (A), by striking "or" after the semicolons;

(B) in subparagraph (B), by striking the period and inserting "; or";

(C) by inserting at the end the following:

"(C) any federally recognized Indian tribe;"

(45) in paragraph (26), as redesignated—

(A) by striking "200" and inserting "50;"

(B) by striking "160,000" and inserting "200,000;"

(46) by inserting after paragraph (27), as redesignated, the following:

"(29) SEX TRAFFICKING.—The term ‘sex trafficking’ means any conduct proscribed by section 1591 of title 18, United States Code, whether or not the conduct occurs in interstate or foreign commerce or within the special maritime and territorial jurisdiction of the United States.

"(30) SEXUAL ASSAULT.—The term ‘sexual assault’ means any nonconsensual sexual act proscribed by Federal, tribal, or State law, including when the victim lacks capacity to consent.

(7) by inserting after paragraph (34), as redesignated, the following:

"(35) TRIBAL COALITION.—The term ‘tribal coalition’ means an established nonprofit, nongovernmental Indian organization, Alaska Native organization, or a Native Hawaiian organization that—"
S. 47—6

"(A) provides education, support, and technical assistance to member Indian service providers in a manner that enables them to provide services that are culturally appropriate services, including shelter and rape crisis services, designed to assist Indian women and the dependents of those women who are victims of domestic violence, dating violence, sexual assault, and stalking, and any other population determined to be underserved by the Attorney General or the Secretary of Health and Human Services, as appropriate; and

"(i) the member service providers described in subparagraph (A); and

"(ii) the tribal communities in which the services are being provided;"

(b) by inserting after paragraph (39), as redesignated, the following:

"(39) UNDERSERVED POPULATIONS.—The term 'underserved populations' means populations who face barriers in accessing and using victim services, and includes populations underserved because of geographic location, religion, sexual orientation, gender identity, underserved social and ethnic populations, populations underserved because of special needs (such as language barriers, disabilities, abuse status, or age), and any other population determined to be underserved by the Attorney General or by the Secretary of Health and Human Services, as appropriate.

"(40) UNIT OF LOCAL GOVERNMENT.—The term 'unit of local government' means any city, county, township, town, borough, parish, village, or other general purpose political subdivision of a State; and

"(41) by inserting after paragraph (42), as redesignated, the following:

"(42) VICTIM SERVICE PROVIDER.—The term 'victim service provider' means a nonprofit, nongovernmental or tribal organization or rape crisis center, including a State or tribal coalition, that assists or advocates for domestic violence, dating violence, sexual assault, or stalking victims, including domestic violence shelters, faith-based organizations, and other organizations, with a documented history of effective work concerning domestic violence, dating violence, sexual assault, or stalking.

"(43) VICTIM SERVICES OR SERVICES.—The terms 'victim services' and 'services' mean services provided to victims of domestic violence, dating violence, sexual assault, or stalking, including telephonic or web-based hotlines, legal advocacy, economic advocacy, emergency and transitional shelter, accommodation and advocacy through medical, civil or criminal justice, immigration, and social support systems, crisis intervention, short-term individual and group support services, information and referrals, culturally specific services, population specific services, and other related supportive services.

"(44) YOUTH.—The term 'youth' means a person who is 11 to 24 years old.

(b) GRANT CONDITIONS.—Subsection (b) of section 40002 of the Violence Against Women Act of 1994 (42 U.S.C. 13925(b)) is amended—

(1) in paragraph (2)—

(A) in subparagraph (B), by striking clauses (i) and

(b) and inserting the following:
"(D) disclose, reveal, or release any personally identifying information or individual information collected in connection with services requested, utilized, or denied through grantees and subgrantees' programs, regardless of whether the information has been encoded, encrypted, hashed, or otherwise protected; or

(ii) disclose, reveal, or release individual client information without the informed, written, reasonably time-limited consent of the person (or in the case of an unrepresented minor, the minor and the parent or guardian or in the case of legal incapacity, a court-appointed guardian) about whom information is sought, whether for this program or any other Federal, State, tribal, or territorial grant program, except that consent for release may not be given by the spouse of the minor, incapacitated person, or the abuser of the other parent of the minor.

If a minor or a person with a legally appointed guardian is permitted by law to receive services without the parent's or guardian's consent, the minor or person with a guardian may release information without additional consent.")

(B) by amending subparagraph (D), to read as follows:

"(D) INFORMATION SHARING.—

(1) Grantees and subgrantees may share—

(i) nonpersonally identifying data in the aggregate regarding services to their clients and nonpersonally identifying demographic information in order to comply with Federal, State, tribal, or territorial reporting, evaluation, or data collection requirements;

(ii) court-generated information and law enforcement-generated information contained in secure, governmental registries for protection order enforcement purposes; and

(iii) law enforcement-generated and prosecution-generated information necessary for law enforcement and prosecution purposes.

(2) In no circumstances may—

(i) an adult, youth, or child victim of domestic violence, dating violence, sexual assault, or stalking be required to provide a consent to release his or her personally identifying information as a condition of eligibility for the services provided by the grantee or subgrantee;

(ii) any personally identifying information be shared in order to comply with Federal, tribal, or State reporting, evaluation, or data collection requirements, whether for this program or any other Federal, tribal, or State grant program; and

(C) by redesignating subparagraph (E) as subparagraph (F); and

(D) by inserting after subparagraph (D) the following:

"(E) STATUTORILY MANDATED REPORTS OF ABUSE OR NEGLECT.—Nothing in this section prohibits a grantee or subgrantee from reporting suspected abuse or neglect, as those terms are defined and specifically mandated by the State or tribe involved."; and
(3) by inserting after subparagraph (F), as redesignated, the following:

"(G) CONFIDENTIALITY ASSESSMENT AND ASSURANCES.—Grantees and subgrantees must document their compliance with the confidentiality and privacy provisions required under this section.",

(2) by striking paragraph (3) and inserting the following:

"(C) APPROVED ACTIVITIES.—In carrying out the activities under this title, grantees and subgrantees may collaborate with or provide information to Federal, State, local, tribal, and territorial public officials and agencies to develop and implement policies and develop and promote State, local, or tribal legislation or model codes designed to reduce or eliminate domestic violence, dating violence, sexual assault, and stalking.";

(3) in paragraph (7), by inserting at the end the following:

"Final reports of such evaluations shall be made available to the public via the agency's website;" and

(4) by inserting after paragraph (11) the following:

"(12) DELIVERY OF LEGAL ASSISTANCE.—Any grantee or subgrantee providing legal assistance with funds awarded under this title shall comply with the eligibility requirements in section 1901(d) of the Violence Against Women Act of 2000 (42 U.S.C. 3796gg-8(d))."

(13) CIVIL RIGHTS.—

"(A) NONDISCRIMINATION.—No person in the United States shall, on the basis of actual or perceived race, color, religion, national origin, sex, gender identity (as defined in paragraph 248(e)(4) of title 18, United States Code), sexual orientation, or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under the Violence Against Women Act of 1994 (title IV of Public Law 103-332; 108 Stat. 1902), the Violence Against Women Act of 2000 (division B of Public Law 106-388; 114 Stat. 1491), the Violence Against Women and Department of Justice Reauthorization Act of 2005 (title IX of Public Law 109-162; 119 Stat. 3050), the Violence Against Women Reauthorization Act of 2013, and any other program or activity funded in whole or in part with funds appropriated for grants, cooperative agreements, and other assistance administered by the Office on Violence Against Women.

"(B) EXCEPTION.—If sex segregation or sex-specific programming is necessary to the essential operation of a program, nothing in this paragraph shall prevent any such program or activity from consideration of an individual's sex. In such circumstances, grantees may meet the requirements of this paragraph by providing comparable services to individuals who cannot be provided with the sex-segregated or sex-specific programming.

"(C) DISCRIMINATION.—The authority of the Attorney General and the Office of Justice Programs to enforce this paragraph shall be the same as it is under section 3796c of title 42, United States Code."
§ 47-9

"(1) CONSTRUCTION.—Nothing contained in this paragraph shall be construed, interpreted, or applied to supplant, displace, preempt, or otherwise diminish the responsibilities and liabilities under other State or Federal civil rights law, whether statutory or common.

"(4) CLARIFICATION OF VICTIM SERVICES AND LEGAL ASSISTANCE.—Victim services and legal assistance under this title also include services and assistance to victims of domestic violence, dating violence, sexual assault, or stalking who are also victims of severe forms of trafficking in persons as defined by section 103 of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7102).

"(10) CONFIDENTIALITY.—

(A) IN GENERAL.—The Office on Violence Against Women shall establish a biennial conferal process with State and tribal coalitions and technical assistance providers who receive funding through grants administered by the Office on Violence Against Women and authorized by this Act, and other key stakeholders.

(B) AREAS Covered.—The areas of conferal under this paragraph shall include—

(i) the administration of grants;

(ii) unmet needs;

(iii) promising practices in the field; and

(iv) emerging trends.

(11) INITIAL CONFERRAL.—The initial conferal shall be initiated not later than 6 months after the date of enactment of the Violence Against Women Reauthorization Act of 2013.

(13) REPORT.—Not later than 90 days after the conclusion of each conferal period, the Office on Violence Against Women shall publish a comprehensive report that—

(i) summarizes the issues presented during conferal and what, if any, policies it intends to implement to address those issues;

(ii) is made available to the public on the Office on Violence Against Women's website and submitted to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives.

(18) ACCOUNTABILITY.—All grants awarded by the Attorney General under this Act shall be subject to the following accountability provisions:

(A) AUDIT REQUIREMENT.—

(A) IN GENERAL.—Beginning in the first fiscal year beginning after the date of enactment of this Act, and in each fiscal year thereafter, the Inspector General of the Department of Justice shall conduct audits of recipients of grants under this Act to prevent waste, fraud, and abuse of funds by grantees. The Inspector General shall determine the appropriate number of grantees to be audited each year.

(B) DEFINITION.—In this paragraph, the term 'unresolved audit finding' means a finding in the final audit report of the Inspector General of the Department of Justice that the audited grantee has utilized
grant funds for an unauthorized expenditure or otherwise unallowable cost that is not closed or resolved within 12 months from the date when the final audit report is issued.

*ii) Mandatory exclusion.—A recipient of grant funds under this Act that is found to have an unresolved audit finding shall not be eligible to receive grant funds under this Act during the following 3 fiscal years.

*iii) Priority.—In awarding grants under this Act, the Attorney General shall give priority to eligible entities that did not have an unresolved audit finding during the 3 fiscal years prior to submitting an application for a grant under this Act.

*iv) Reimbursement.—If an entity is awarded grant funds under this Act during the 2-fiscal-year period in which the entity is barred from receiving grants under paragraph (2), the Attorney General shall:

1. Deposit an amount equal to the grant funds that were improperly awarded to the grantee into the General Fund of the Treasury and
2. Seek to recoup the costs of the repayment to the fund from the grant recipient that was erroneously awarded grant funds.

*(ii) Nonprofit organization requirements.—

*1) Definition.—For purposes of this paragraph and the grant programs described in this Act, the term 'nonprofit organization' means an organization that is described in section 501(c)(3) of the Internal Revenue Code of 1980 and is exempt from taxation under section 501(a) of such Code.

*2) Prohibition.—The Attorney General may not award a grant under any grant program described in this Act to a nonprofit organization that holds money in offshore accounts for the purpose of avoiding paying the tax described in section 511(a) of the Internal Revenue Code of 1980.

*3) Disclosure.—Each nonprofit organization that is awarded a grant under a grant program described in this Act and uses the procedures prescribed in regulations to create a rebuttable presumption of reasonableness for the compensation of its officers, directors, trustees, and key employees, shall disclose to the Attorney General in the application for the grant, the process for determining such compensation, including the independent persons involved in reviewing and approving such compensation, the comparability data used, and contemporaneous substantiation of the deliberation and decision. Upon request, the Attorney General shall make the information disclosed under this subsection available for public inspection.

*(ii) Conference expenditures.—

*1) Limitation.—No amounts authorized to be appropriated to the Department of Justice under this Act may be used by the Attorney General, or by any
individual or organization awarded discretionary funds through a cooperative agreement under this Act, to host or support any expenditure for conferences that uses more than $25,000 in Department funds, unless the Deputy Attorney General or such Assistant Attorney General, Directors, or principal deputies as the Deputy Attorney General may designate, provides prior written authorization that the funds may be expended to host a conference.

(ii) **WRITTEN APPROVAL.**—Written approval under clause (i) shall include a written estimate of all costs associated with the conference, including the cost of all food and beverages, audiovisual equipment, honoraria for speakers, and any entertainment.

(iii) **REPORT.**—The Deputy Attorney General shall submit an annual report to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives on all approved conference expenditures referenced in this paragraph.

(iv) **ANNUAL CERTIFICATION.**—Beginning in the first fiscal year beginning after the date of the enactment of this Act, the Attorney General shall submit, to the Committee on the Judiciary and the Committee on Appropriations of the Senate and the Committee on the Judiciary and the Committee on Appropriations of the House of Representatives, an annual certification that—

(1) all audits issued by the Office of the Inspector General under paragraph (i) have been completed and reviewed by the appropriate Assistant Attorney General or Director;

(2) all mandatory exclusions required under subparagraph (A)(i) of this section have been made;

(3) all reimbursements required under subparagraph (A)(v) of this section have been made; and

(iv) includes a list of any grant recipients excluded under subparagraph (A) from the previous year.

SEC. 4. EFFECTIVE DATE.

Except as otherwise specifically provided in this Act, the provisions of titles I, II, III, IV, VII, and sections 3, 602, 901, and 902 of this Act shall not take effect until the beginning of the fiscal year following the date of enactment of this Act.

**TITLE I—ENHANCING JUDICIAL AND LAW ENFORCEMENT TOOLS TO COMBAT VIOLENCE AGAINST WOMEN**

**SEC. 101. STOP GRANTS.**

Title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3711 et seq.) is amended—

(1) in section 1001(a)(18) (42 U.S.C. 3790(c)(18)), by striking "$225,000,000 for each of fiscal years 2007 through 2011" and inserting "$225,000,000 for each of fiscal years 2014 through 2016";
S.47—12

(2) in section 501(h) (42 U.S.C. 3796g-1(h))—

(A) in the matter preceding paragraph (1)—

(i) by striking "equipment" and inserting "resources"; and

(ii) by inserting "for the protection and safety of victims," after "women,";

(B) in paragraph (1), by striking "sexual assault" and all that follows through "dating violence" and inserting "domestic violence, dating violence, sexual assault, and stalking, including the appropriate use of nonimmigrant status under subparagraphs (I) and (U) of section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101(a))";

(C) in paragraph (2), by striking "sexual assault and domestic violence" and inserting "domestic violence, dating violence, sexual assault, and stalking";

(D) in paragraph (3), by striking "sexual assault and domestic violence" and inserting "domestic violence, dating violence, sexual assault, and stalking, as well as the appropriate treatment of victims";

(E) in paragraph (4)—

(i) by striking "sexual assault and domestic violence" and inserting "domestic violence, dating violence, sexual assault, and stalking"; and

(ii) by inserting ", classifying," after "identifying";

(F) in paragraph (5)—

(i) by inserting "and legal assistance" after "victim services";

(ii) by striking "domestic violence and dating violence" and inserting "domestic violence, dating violence, and stalking"; and

(iii) by striking "sexual assault and domestic violence" and inserting "domestic violence, sexual assault, and stalking";

(G) by striking paragraph (6) and redesignating paragraphs (7) through (14) as paragraphs (6) through (13), respectively;

(H) in paragraph (6), as redesignated by subparagraph (G), by striking "sexual assault and domestic violence" and inserting "domestic violence, dating violence, sexual assault, and stalking";

(I) in paragraph (7), as redesignated by subparagraph (G), by striking "and dating violence" and inserting "dating violence, and stalking";

(J) in paragraph (8), as redesignated by subparagraph (G), by striking "domestic violence or sexual assault" and inserting "domestic violence, dating violence, sexual assault, or stalking";

(K) in paragraph (13), as redesignated by subparagraph (G)—

(i) in subparagraph (A), by striking "triage protocols to ensure that dangerous or potentially lethal cases are identified and prioritized" and inserting "the use of evidence-based indicators to assess the risk of domestic and dating violence homicides and prioritize dangerous or potentially lethal cases"; and

(ii) by striking "and" at the end;
(L) in paragraph (13), as redesignated by subparagraph (G)—
   (i) by striking "to provide" and inserting "providing";
   (ii) by striking "nonprofit nongovernmental";
   (iii) by striking the comma after "local governmental";
   (iv) in the matter following subparagraph (C), by striking "paragraph (14)" and inserting "paragraph (13)"; and
   (v) by striking the period at the end and inserting a semicolon; and
   (iii) by inserting after paragraph (13), as redesignated by subparagraph (G), the following:
   "(14) developing and promoting State, local, or tribal legislation and policies that enhance best practices for responding to domestic violence, dating violence, sexual assault, and stalking;
   "(15) developing, implementing, or enhancing Sexual Assault Response Teams, or other similar coordinated community responses to sexual assault;
   "(16) developing and strengthening policies, protocols, best practices, and training for law enforcement agencies and prosecutors relating to the investigation and prosecution of sexual assault cases and the appropriate treatment of victims;
   "(17) developing, enlarging, or strengthening programs addressing sexual assault against men, women, and youth in correctional and detention settings;
   "(18) identifying and conducting inventories of backlogs of sexual assault evidence collection kits and developing protocols and policies for responding to and addressing such backlogs, including protocols and policies for notifying and involving victims;
   "(19) developing, enlarging, or strengthening programs and projects to provide services and responses targeting male and female victims of domestic violence, dating violence, sexual assault, or stalking, whose ability to access traditional services and responses is affected by their sexual orientation or gender identity, as defined in section 946C of title 18, United States Code; and
   "(20) developing, enhancing, or strengthening prevention and educational programming to address domestic violence, dating violence, sexual assault, or stalking, with not more than 5 percent of the amount allocated to a State to be used for this purpose.";
(3) in section 2007 (42 U.S.C. 2796g-1)—
   (A) in subsection (a), by striking "nonprofit nongovernmental victim service programs" and inserting "victim service providers";
   (B) in subsection (b)(6), by striking "not including populations of Indian tribes";
   (C) in subsection (c)—
      (i) by striking paragraph (2) and inserting the following:
      "(2) grantees and subgrantees shall develop a plan for implementation and shall consult and coordinate with—
      "(A) the State sexual assault coalition;"
“(B) the State domestic violence coalition;
(C) the law enforcement entities within the State;
(D) prosecution offices;
(E) State and local courts;
(F) Tribal governments in those States with State or federally recognized Indian tribes;
(G) representatives from underserved populations, including culturally specific populations;
(H) victim service providers;
(I) population specific organizations; and
(J) other entities that the State or the Attorney General identifies as needed for the planning process;”;
(ii) by redesignating paragraph (3) as paragraph
(4);
(iii) by inserting after paragraph (2), as amended by clause (i), the following:
“(S) grantees shall coordinate the State implementation plan described in paragraph (3) with the State plans described in section 307 of the Family Violence Prevention and Services Act (42 U.S.C. 10407) and the programs described in section 1401 of the Victims of Crime Act of 1984 (42 U.S.C. 10603) and section 293A of the Public Health Service Act (42 U.S.C. 280b–1b);”;
(iv) in paragraph (4), as redesignated by clause
(ii)—
(I) in subparagraph (A), by striking "and not less than 25 percent shall be allocated for prosecutors";
(II) by redesignating subparagraphs (B) and (C) as subparagraphs (G) and (H);
(III) by inserting after subparagraph (A), the following:
“(B) not less than 25 percent shall be allocated for prosecutors;” and
(IV) in subparagraph (D) as redesignated by
subclause (II) by striking "for" and inserting "to";
and
(c) by adding at the end the following:
“(5) not later than 3 years after the date of enactment
of this Act, and every year thereafter, not less than 20 percent
of the total amount granted to a State under this subchapter
shall be allocated for programs or projects in 2 or more allocations listed in paragraph (4) that meaningfully address sexual assault, including stranger rape, acquaintance rape, alcohol or drug-facilitated rape, and rape within the context of an intimate partner relationship;”;
(D) by striking subsection (d) and inserting the fol-
lowing:
“(d) APPLICATION REQUIREMENTS.—An application for a grant
under this section shall include—
(I) the certifications of qualification required under sub-
section (c);
(II) proof of compliance with the requirements for the
payment of forensic medical exams and judicial notification, described in section 2010;
"(C) proof of compliance with the requirements for paying fees and costs relating to domestic violence and protection order cases, described in section 2011 of this title; 

"(D) proof of compliance with the requirements prohibiting polygraph examinations of victims of sexual assault, described in section 2013 of this title; 

"(E) an implementation plan required under subsection (d); and 

"(F) any other documentation that the Attorney General may require; 

(ii) in subsection (c)—
(i) in paragraph (2)—
(1) in subparagraph (A), by striking “domestic violence and sexual assault” and inserting “domestic violence, dating violence, sexual assault, and stalking”; and 

(2) in subparagraph (D), by striking “linguistically and”, and 

(3) by adding at the end the following: 

"(3) CONDITIONS.—In disbursing grants under this part, the Attorney General may impose reasonable conditions on grant awards to ensure that the States meet statutory, regulatory, and other program requirements; 

(F) in subsection (b), by striking the period at the end and inserting , except that, for purposes of this subsection, the costs of the projects for victim services or tribes for which there is an exemption under section 40802(b)(1) of the Violence Against Women Act of 1994 (42 U.S.C. 13928(b)(1)) shall not count toward the total costs of the projects;"; and 

(G) by adding at the end the following: 

"(i) IMPLEMENTATION PLANS.—A State applying for a grant under this part shall— 

(A) develop an implementation plan in consultation with the entities listed in subsection (c)(2), that identifies how the State will use the funds awarded under this part, including how the State will meet the requirements of subsection (c)(5); and 

(B) submit to the Attorney General— 

(A) the implementation plan developed under paragraph (1); 

(C) documentation from each member of the planning committee as to their participation in the planning process; 

(C) documentation from the prosecution, law enforcement, court, and victim services programs to be assisted, describing— 

(i) the need for the grant funds; 

(ii) the intended use of the grant funds; 

(iii) the expected result of the grant funds; and 

(iv) the demographic characteristics of the populations to be served, including age, disability, race, ethnicity, and language background; 

(C) a description of how the State will ensure that any subgrantees will consult with victim service providers during the course of developing their grant applications in order to ensure that the proposed activities are designed
to promote the safety, confidentiality, and economic independence of victims;

"(B) demographic data on the distribution of underserved populations within the State and a description of how the State will meet the needs of underserved populations, including the minimum allocation for population specific services required under subsection (a)(4)(G);

"(C) a description of how the State plans to meet the regulations issued pursuant to subsection (a)(2);

"(G) goals and objectives for reducing domestic violence-related homicides within the State; and

"(H) any other information requested by the Attorney General.

"(I) Reallocation of funds.—A State may use any returned or remaining funds for any authorized purpose under this part if—

"(1) funds from a subgrant awarded under this part are returned to the State; or

"(2) the State does not receive sufficient eligible applications to award the full funding within the allocations in subsection (a)(4);

"(4) in section 2010 (42 U.S.C. 3796gg-4)—

"(A) in subsection (a), by striking paragraph (1) and inserting the following:

"(I) in general.—A State, Indian tribal government, or unit of local government shall not be entitled to funds under this subchapter unless the State, Indian tribal government, unit of local government, or another governmental entity—

"(A) incurs the full out-of-pocket cost of forensic medical exams described in subsection (b) for victims of sexual assault; and

"(B) coordinates with health care providers in the region to notify victims of sexual assault of the availability of rape exams at no cost to the victims."

"(B) in subsection (b)—

"(i) in paragraph (1), by inserting "or" after the semicolon;

"(ii) in paragraph (2), by striking "; or" and inserting a period; and

"(iii) by striking paragraph (3); and

"(C) by amending subsection (d) to read as follows:

"(4) Noncooperation.—

"(1) in general.—To be in compliance with this section, a State, Indian tribal government, or unit of local government shall comply with subsection (b) without regard to whether the victim participates in the criminal justice system or cooperates with law enforcement.

"(2) Compliance period.—States, territories, and Indian tribal governments shall have 3 years from the date of enactment of this Act to come into compliance with this section; and


"(A) by inserting "modification, enforcement, dismissal, withdrawal" after "registration," each place it appears; and

"(B) by inserting "dating violence, sexual assault, or stalking" after "felony domestic violence,"
(C) by striking "victim of domestic violence" and all that follows through "sexual assault" and inserting "victim of domestic violence, dating violence, sexual assault, or stalking".

SEC. 101. GRANTS TO ENCOURAGE ARREST POLICIES AND ENFORCEMENT OF PROTECTION ORDERS.

(a) IN GENERAL.—Part U of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796h et seq.) is amended—

(1) in section 2101 (42 U.S.C. 3796h)—

(A) in subsection (b)—

(i) in the matter preceding paragraph (1), by striking "States," and all that follows through "units of local government" and inserting "grantees";

(ii) in paragraph (1), by inserting "and enforcement of protection orders across State and tribal lines" before the period;

(iii) in paragraph (2), by striking "and training in police departments to improve tracking of cases" and inserting "data collection systems, and training in police departments to improve tracking of cases and classification of complaints";

(iv) in paragraph (4), by inserting "and provide the appropriate training and education about domestic violence, dating violence, sexual assault, and stalking" after "computer tracking systems";

(v) in paragraph (5), by inserting "and other victim services" after "legal advocacy service programs";

(vi) in paragraph (6), by striking "judges" and inserting "Federal, State, tribal, territorial, and local judges, courts, and court-based and court-related personnel";

(vii) in paragraph (8), by striking "and sexual assault" and inserting "dating violence, sexual assault, and stalking";

(viii) in paragraph (10), by striking "non-profit, non-governmental victim services organizations" and inserting "victim service providers, staff from population specific organizations," and

(ix) by adding at the end the following:

"(14) To develop and implement training programs for prosecutors and other prosecution-related personnel regarding best practices to ensure offender accountability, victim safety, and victim consultation in cases involving domestic violence, dating violence, sexual assault, and stalking.

(15) To develop or strengthen policies, protocols, and training for law enforcement, prosecutors, and the judiciary in recognizing, investigating, and prosecuting instances of domestic violence, dating violence, sexual assault, and stalking against immigrant victims, including the appropriate use of applications for nonimmigrant status under subparagraphs (T) and (U) of section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)).

(16) To develop and promote State, local, or tribal legislation and policies that enhance best practices for responding to the crimes of domestic violence, dating violence, sexual
assault, and stalking, including the appropriate treatment of victims.

(c) To develop, implement, or enhance sexual assault nurse examiner programs or sexual assault forensic examiner programs, including the hiring and training of such examiners.

(d) To develop, implement, or enhance Sexual Assault Response Teams or similar coordinated community responses to sexual assault.

(e) To develop and strengthen policies, protocols, and training for law enforcement officers and prosecutors regarding the investigation and prosecution of sexual assault cases and the appropriate treatment of victims.

(f) To provide human immunodeficiency virus testing programs, counseling, and prophylaxis for victims of sexual assault.

(g) To identify and inventory backlogs of sexual assault evidence collection kits and to develop protocols for responding to and addressing such backlogs, including policies and protocols for notifying and involving victims.

(h) To develop multidisciplinary high-risk teams focusing on reducing domestic violence and dating violence homicides by—

(A) using evidence-based indicators to assess the risk of homicide and link high-risk victims to immediate crisis intervention services;

(B) identifying and managing high-risk offenders; and

(C) providing ongoing victim advocacy and referrals to comprehensive services including legal, housing, health care, and economic assistance.

(i) in subsection (c)—

(I) in paragraph (1)—

(ii) in the matter preceding subparagraph (A), by inserting "except for a court," before "certify";

and

(iii) by redesignating subparagraphs (A) and

(B) as clauses (i) and (ii), and adjusting the margin accordingly;

(iv) in paragraph (2), by inserting "except for a court," before "demonstrate";

(v) in paragraph (3)—

(I) by striking "spouses" each place it appears and inserting "parties"; and

(ii) by striking "spouse" and inserting "party";

(vi) in paragraph (4)—

(I) by inserting "dating violence, sexual assault, or stalking" after "felony domestic violence";

(ii) by inserting "modification, enforcement, dismissal," after "registration," each place it appears;

(iii) by inserting "dating violence," after "victim of domestic violence"; and

(iv) by striking "and" at the end;

(v) in paragraph (5)—

(I) in the matter preceding subparagraph (A), by striking ", not later than 3 years after January 1, 2006";
S. 47—19

(II) by inserting", trial of, or sentencing for" after "investigation of" each place it appears;
(III) by redesignating subparagraphs (A) and
(ii) as clauses (i) and (ii), and adjusting the margin accordingly;
(iv) in clause (d), as redesignated by subclause
(III) of this clause, by striking "subparagraph (A)"
and inserting "clause (B)"; and
(v) by striking the period at the end and
inserting "; and";
(vi) by redesignating paragraphs (1) through (3),
as amended by this subparagraph, as subparagraphs
(A) through (E), respectively;
(vii) in the matter preceding subparagraph (A),
as redesignated by clause (c) of this subparagraph—
(I) by striking the comma that immediately
follows another comma; and
(II) by striking "grantees are States" and
inserting the following: "grantees are—"
"(1) States;"
and
(viii) by adding at the end the following:
"(2) a State, tribal, or territorial domestic
violence or sexual assault coalition or a victim
service provider that partners with a State, Indian
tribal government, or unit of local
government that certifies that the State, Indian
tribal government, or unit of local
government meets the requirements under
paragraph (1);"
(C) in subsection (b)—
(i) in paragraph (1)—
(1) in the matter preceding subparagraph (A),
by inserting ", policy," after "law;" and
(2) in subparagraph (A), by inserting "and
the defendant is in custody or has been served
with the information or indictment" before the
semicolon; and
(ii) in paragraph (2), by striking "it" and inserting
"this"; and
(D) by adding at the end the following:
"(1) Allocation for Tribal Coalitions.—Of the
amounts appropriated for purposes of this part for
each fiscal year, not less than 6 percent shall be
available for grants under section 3109 of title III
of the Omnibus Crime Control and Safe Streets
"(q) Allocation for Sexual Assault.—Of the
amounts appropriated for purposes of this part for
each fiscal year, not less than 25 percent shall be
available for projects that address sexual
assault, including stranger rape, acquaintance rape,
sexual assault, and rape within the context of an
intimate partner relationship;" and
(2) in section 3105(a) (42 U.S.C. 3796hh–1(a))—
(A) in paragraph (1), by inserting "tribal
government," and
(B) in paragraph (4), by striking "nonprofit, private
sexual assault and domestic violence programs" and
inserting "victim service providers and, as appropriate,
population specific organizations".
S. 47—20

(b) AUTHORIZATION OF APPROPRIATIONS.—Section 1001(a)(19) of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 2000k-13(a)) is amended—

(1) by striking "$75,000,000" and all that follows through "2011," and inserting "$73,000,000 for each of fiscal years 2014 through 2018."; and

(2) by striking the period that immediately follows another period.

SEC. 303. LEGAL ASSISTANCE FOR VICTIMS.

Section 1901 of the Violence Against Women Act of 2000 (42 U.S.C. 2086gg-6) is amended—

(1) in subsection (a)—

(A) in the first sentence, by striking "arising as a consequence of" and inserting "relating to or arising out of"; and

(B) in the second sentence, by inserting "or arising out of" after "relating to";

(2) in subsection (b)—

(A) in the heading, by inserting "AND GRANT CONDITIONS" after "DEFINITIONS"; and

(B) by inserting "and grant conditions" after "definitions";

(3) in subsection (d)—

(A) in paragraph (1), by striking "victims services organizations" and inserting "victim service providers"; and

(B) by striking paragraph (5) and inserting the following:

"(5) to implement, expand, and establish efforts and projects to provide competent, supervised pro bono legal assistance for victims of domestic violence, dating violence, sexual assault, or stalking, except that not more than 10 percent of the funds awarded under this section may be used for the purpose described in this paragraph.";

(4) in subsection (e)—

(A) in paragraph (1), by striking "this section has completed" and all that follows and inserting the following: "this section—"

"(A) has demonstrated expertise in providing legal assistance to victims of domestic violence, dating violence, sexual assault, or stalking in the targeted population; or

(B)(i) is partnered with an entity or person that has demonstrated expertise described in subparagraph (A); and

(ii) has completed, or will complete, training in connection with domestic violence, dating violence, sexual assault, or stalking, or related legal issues, including training on evidence-based risk factors for domestic and dating violence homicide;"; and

(B) in paragraph (2), by striking "stalking organization" and inserting "stalking victim service provider"; and

(5) in subsection (f) in paragraph (1), by striking "this section" and all that follows and inserting the following: "this section $57,000,000 for each of fiscal years 2014 through 2018.";

SEC. 304. CONSOLIDATION OF GRANTS TO SUPPORT FAMILIES IN THE JUSTICE SYSTEM.

(a) IN GENERAL.—Title III of division B of the Victims of Trafficking and Violence Protection Act of 2000 (Pub. L. 106–386;
114 Stat. 1590) is amended by striking the section preceding section 1892 (42 U.S.C. 10420), as amended by section 306 of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (Public Law 109–162; 119 Stat. 316), and inserting the following:

"SEC. 1391. GRANTS TO SUPPORT FAMILIES IN THE JUSTICE SYSTEM.

"(a) IN GENERAL.—The Attorney General may make grants to States, units of local government, courts (including juvenile courts), Indian tribal governments, nonprofit organizations, legal services providers, and victim services providers to improve the response of all aspects of the civil and criminal justice system to families with a history of domestic violence, dating violence, sexual assault, or stalking, or in cases involving allegations of child sexual abuse.

"(b) USE OF FUNDS.—A grant under this section may be used to—

"(1) provide supervised visitation and safe visitation exchange of children and youth by and between parents in situations involving domestic violence, dating violence, child sexual abuse, sexual assault, or stalking;

"(2) develop and promote State, local, and tribal legislation, policies, and best practices for improving civil and criminal court functions, responses, practices, and procedures in cases involving a history of domestic violence or sexual assault, or in cases involving allegations of child sexual abuse, including cases in which the victim proceeds pro se;

"(3) educate court-based and court-related personnel and court-appointed personnel (including custody evaluators and guardians ad litem) and child protective services workers on the dynamics of domestic violence, dating violence, sexual assault, and stalking, including information on perpetrator behavior, evidence-based risk factors for domestic and dating violence homicide, and on issues relating to the needs of victims, including safety, security, privacy, and confidentiality, including cases in which the victim proceeds pro se;

"(4) provide appropriate resources in juvenile court matters to respond to dating violence, domestic violence, sexual assault (including child sexual abuse), and stalking and ensure necessary services dealing with the health and mental health of victims are available;

"(5) enable courts or court-based or court-related programs to develop or enhance—

"(A) court infrastructure (such as specialized courts, consolidated courts, docket cards, intake centers, or interpreter services);

"(B) community-based initiatives within the court system (such as court watch programs, victim assistance programs, pro se victim assistance programs, or community-based supplementary services);

"(C) offender management, monitoring, and accountability programs;

"(D) safe and confidential information storage and information-sharing databases within and between court systems;"
(e) education and outreach programs to improve community access, including enhanced access for underserved populations; and
(f) other projects likely to improve court responses to domestic violence, dating violence, sexual assault, and stalking;
(g) provide civil legal assistance and advocacy services, including legal information and resources in cases in which the victim proceeds pro se, to—
(A) victims of domestic violence; and
(B) nonoffending parents in matters—
(i) that involve allegations of child sexual abuse;
(ii) that relate to family matters, including civil protection orders, custody, and divorce; and
(iii) in which the other parent is represented by counsel;
(h) collect data and provide training and technical assistance, including developing State, local, and tribal model codes and polities, to improve the capacity of grantees and communities to address the civil justice needs of victims of domestic violence, dating violence, sexual assault, and stalking who have legal representation, who are proceeding pro se, or who are proceeding with the assistance of a legal advocate; and
(i) to improve training and education to assist judges, judicial personnel, attorneys, child welfare personnel, and legal advocates in the civil justice system.

(c) Considerations.—
(1) In general.—In making grants for purposes described in paragraphs (1) through (7) of subsection (b), the Attorney General shall consider—
(A) the number of families to be served by the proposed programs and services;
(B) the extent to which the proposed programs and services serve underserved populations;
(C) the extent to which the applicant demonstrates cooperation and collaboration with nonprofit, nongovernmental entities in the local community with demonstrated histories of effective work on domestic violence, dating violence, sexual assault, or stalking, including State or tribal domestic violence coalitions, State or tribal sexual assault coalitions, local shelters, and programs for domestic violence and sexual assault victims; and
(D) the extent to which the applicant demonstrates coordination and collaboration with State, tribal, and local court systems, including mechanisms for communication and referral.

(2) Other grants.—In making grants under subsections (b)(6) the Attorney General shall take into account the extent to which the grantee has expertise addressing the judicial system’s handling of family violence, child custody, child abuse and neglect, adoption, foster care, supervised visitation, divorce, and parental.

(d) Applicant requirements.—The Attorney General may make a grant under this section to an applicant that—
(1) demonstrates expertise in the areas of domestic violence, dating violence, sexual assault, stalking, or child sexual abuse, as appropriate;
"(2) ensures that any fees charged to individuals for use of supervised visitation programs and services are based on the income of those individuals, unless otherwise provided by court order;

"(3) for a court-based program, certifies that victims of domestic violence, dating violence, sexual assault, or stalking are not charged fees or any other costs related to the filing, petitioning, modifying, issuance, registration, enforcement, withdrawal, or dismissal of matters relating to the domestic violence, dating violence, sexual assault, or stalking;

"(4) demonstrates that adequate security measures, including adequate facilities, procedures, and personnel capable of preventing violence, and adequate standards are, or will be, in place (including the development of protocols or policies to ensure that confidential information is not shared with courts, law enforcement agencies, or child welfare agencies unless necessary to ensure the safety of any child or adult using the services of a program funded under this section), if the applicant proposes to operate supervised visitation programs and services or safe visitation exchanges;

"(5) certifies that the organizational policies of the applicant do not require mediation or counseling involving offenders and victims being physically present in the same place, in cases where domestic violence, dating violence, sexual assault, or stalking is alleged;

"(6) certifies that any person providing legal assistance through a program funded under this section has completed or will complete training on domestic violence, dating violence, sexual assault, and stalking, including child sexual abuse, and related legal issues and

"(7) certifies that any person providing custody evaluation or guardian ad litem services through a program funded under this section has completed or will complete training developed with input from and in collaboration with a tribal, State, territorial, or local domestic violence, dating violence, sexual assault, or stalking victim service provider or coalition on the dynamics of domestic violence and sexual assault, including child sexual abuse, that includes training on how to review evidence of past abuse and the use of evidenced-based theories to make recommendations on custody and visitation.

(a) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated for carry out this section, $22,000,000 for each of fiscal years 2014 through 2018. Amounts appropriated pursuant to this subsection shall remain available until expended.

"(1) IN GENERAL.—Not less than 10 percent of the total amount available under this section for each fiscal year shall be available for grants under the program authorized by section 3796gg–10 of this title.

"(2) APPLICABILITY OF PART.—The requirements of this section shall not apply to funds allocated for the program described in paragraph (1)."

(b) TECHNICAL AND CONFORMING AMENDMENT.—Subtitle J of the Violence Against Women Act of 1994 (42 U.S.C. 14044 et seq.) is repealed.
SEC. 105. SEX OFFENDER MANAGEMENT.

Section 40192(c) of the Violence Against Women Act of 1994 (42 U.S.C. 13901) is amended by striking "$5,000,000" and all that follows and inserting "$5,000,000 for each of fiscal years 2014 through 2018.").

SEC. 106. COURT-APPOINTED SPECIAL ADVOCATE PROGRAM.

Subtitle B of title II of the Crime Control Act of 1990 (42 U.S.C. 13911 et seq.) is amended—
(1) in section 216 (42 U.S.C. 13912), by striking “January 1, 2015” and inserting “January 1, 2016”;
(2) in section 217 (42 U.S.C. 13913)—
(A) by striking “Code of Ethics” in section (c)(2) and inserting “Standards for Programs” and
(B) by adding at the end the following:
“(c) REPORTING.—An organization that receives a grant under this section for a fiscal year shall submit to the Administrator a report regarding the use of the grant for the fiscal year, including a discussion of outcomes performance measures which shall be established by the Administrator to determine the effectiveness of the programs of the organization in meeting the needs of children in the child welfare system,” and
(3) in section 219(a) (42 U.S.C. 13914(a)), by striking “fiscal years 2007 through 2011” and inserting “fiscal year 2014 through 2016.

SEC. 107. CRIMINAL PROVISION RELATING TO STALKING, INCLUDING CYBERTALKING.

(a) INTERSTATE DOMESTIC VIOLENCE.—Section 2261(a)(1) of title 18, United States Code, is amended—
(1) by inserting “is present” after “Indian Country or”; and
(2) by inserting “or presence” after “as a result of such travel”; and
(b) STALKING.—Section 2261A of title 18, United States Code, is amended to read as follows:

"§ 2261A. Stalking

"Whoever—

(1) travels in interstate or foreign commerce or is present within the special maritime and territorial jurisdiction of the United States, or enters or leaves Indian country, with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, and in the course of, or as a result of, such travel or presence engages in conduct that—

(A) places that person in reasonable fear of the death of, or serious bodily injury to—

(i) that person;

(ii) an immediate family member (as defined in section 115) of that person; or

(iii) a spouse or intimate partner of that person;

or

(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of subparagraph (A); or

(2) uses a communication device to make a threatening communication that—

(A) places that person in reasonable fear of the death of, or serious bodily injury to—

(i) that person;

(ii) an immediate family member (as defined in section 115) of that person; or

(iii) a spouse or intimate partner of that person;

or

(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of subparagraph (A); or

(3) follows or harasses another person outside the United States or Indian country.

"Whoever violates this section shall be fined, imprisoned, or both."
"(b) with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, uses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to engage in a course of conduct that—

(A) places such person in reasonable fear of the death of or serious bodily injury to a person described in clause (i), (ii), or (iii) of paragraph (1)(A); or

(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of paragraph (1)(A), shall be punished as provided in section 2281(b) of this title."

(c) INTERSTATE VIOLATION OF PROTECTION ORDER.—Section 2265(a)(3) of title 18, United States Code, is amended by inserting "in person" after "Indian Country or"

SEC. 188. OUTREACH AND SERVICES TO UNDESERVED POPULATIONS GRANT.

Section 130 of the Violence Against Women Act of 2000 (42 U.S.C. 13936) is amended to read as follows:

"SEC. 130. GRANTS FOR OUTREACH AND SERVICES TO UNDESERVED POPULATIONS.

"(a) Grants Authorized.—

"(1) IN GENERAL.—Of the amounts appropriated under the grant programs identified in paragraph (2), the Attorney General shall take 2 percent of such appropriated amounts and combine them to award grants to eligible entities described in subsection (b) of this section to develop and implement outreach strategies targeted at adult or youth victims of domestic violence, dating violence, sexual assault, or stalking in underserved populations and to provide victim services to meet the needs of adult and youth victims of domestic violence, dating violence, sexual assault, and stalking in underserved populations. The requirements of the grant programs identified in paragraph (2) shall not apply to this grant program.

"(2) Programs Covered.—The programs covered by paragraph (1) are the programs carried out under the following provisions:


"(b) Eligible Entities.—Eligible entities under this section are—

"(1) population specific organizations that have demonstrated experience and expertise in providing population specific services to the relevant underserved communities, or population specific organizations working in partnership with a victim service provider or domestic violence or sexual assault coalition;

"(2) victim service providers offering population specific services to a specific underserved population; or
"(3) victim service providers working in partnership with a national, State, tribal, or local organization that has demonstrated experience and expertise in providing population specific services in the relevant underserved population.

"(c) PLANNING GRANTS.—The Attorney General may use up to 26 percent of funds available under this section to make one-time planning grants to eligible entities to support the planning and development of specially designed and targeted programs for adult and youth victims in one or more underserved populations, including—

"(1) identifying, building and strengthening partnerships with potential collaborators within underserved populations, Federal, State, tribal, territorial or local government entities, and public and private organizations;

"(2) conducting a needs assessment of the community and the targeted underserved population or populations to determine what the barriers are to service access and what factors contribute to these barriers, using input from the targeted underserved population or populations;

"(3) identifying promising prevention, outreach and intervention strategies for victimization; and

"(4) developing a plan, with the input of the targeted underserved population or populations, for implementing prevention, outreach and intervention strategies to address the barriers to accessing services, promoting community engagement in the prevention of domestic violence, dating violence, sexual assault, and stalking within the targeted underserved populations, and evaluating the program.

"(d) IMPLEMENTATION GRANTS.—The Attorney General shall make grants to eligible entities for the purpose of providing or enhancing population specific outreach and services to adult and youth victims in one or more underserved populations, including—

"(1) working with Federal, State, tribal, territorial and local governments, agencies, and organizations to develop or enhance population specific services;

"(2) strengthening the capacity of underserved populations to provide population specific services;

"(3) strengthening the effectiveness of criminal and civil justice interventions by providing training for law enforcement, prosecutors, judges and other court personnel on domestic violence, dating violence, sexual assault, or stalking in underserved populations; or

"(4) working in cooperation with an underserved population to develop and implement outreach, education, prevention, and intervention strategies that highlight available resources and the specific issues faced by victims of domestic violence, dating violence, sexual assault, or stalking from underserved populations.

"(e) APPLICATION.—An eligible entity desiring a grant under this section shall submit an application to the Director of the Office on Violence Against Women at such time, in such form, and in such manner as the Director may prescribe.

"(f) REPORTS.—Each eligible entity receiving a grant under this section shall submit to the Director of the Office on Violence.
S. 47—27

Against Women a report that describes the activities carried out with grant funds.

(g) AUTHORIZATION OF APPROPRIATIONS.—In addition to the funds identified in subsection (a)(1), there are authorized to be appropriated to carry out this section $2,000,000 for each of fiscal years 2014 through 2018.

(h) DEFINITIONS AND GRANT CONDITIONS.—In this section the definitions and grant conditions in section 49005 of the Violence Against Women Act of 1994 (42 U.S.C. 13928c) shall apply.

SEC. 165. CULTURALLY SPECIFIC SERVICES GRANT.

Section 121 of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (42 U.S.C. 14045a) is amended—

(1) in the section heading, by striking "AND LINGUISTICALLY";

(2) by striking "and linguistically" each place it appears;

(3) by striking "and linguisti" each place it appears;

(4) by striking subsection (a)(2) and inserting:

"(2) PROGRAMS COVERED.—The programs covered by paragraph (1) are the programs carried out under the following provisions:

(A) Section 2101 of the Omnibus Crime Control and Safe Streets Act of 1968 (Grants to Encourage Arrest Policies and Enforcement of Protection Orders);

(B) Section 14301 of Division B of the Victims of Trafficking and Violence Protection Act of 2000 (42 U.S.C. 3796gg-6) (Legal Assistance for Victims);

(C) Section 49295 of the Violence Against Women Act of 1994 (42 U.S.C. 13971) (Domestic Violence, Dating Violence, Sexual Assault, Stalking, and Child Abuse Enforcement Assistance);

(D) Section 49020 of the Violence Against Women Act of 1994 (42 U.S.C. 14041a) (Enhanced Training and Services to End Violence Against Women Later in Life);

(E) Section 1402 of Division B of the Victims of Trafficking and Violence Protection Act of 2000 (42 U.S.C. 3796gg-7) (Education, Training, and Enhanced Services to End Violence Against and Abuse of Women with Disabilities);"; and

(5) in subsection (g), by striking "linguistic and".

TITLE II—IMPROVING SERVICES FOR VICTIMS OF DOMESTIC VIOLENCE, DATING VIOLENCE, SEXUAL ASSAULT, AND STALKING

SEC. 101. SEXUAL ASSAULT SERVICES PROGRAM.

(a) GRANTS TO STATES AND TERRITORIES.—Section 41601(b) of the Violence Against Women Act of 1994 (42 U.S.C. 14048f(b)) is amended—

(1) in paragraph (1), by striking "other programs" and all that follows and inserting "other nongovernmental or tribal programs and projects to assist individuals who have been
victimized by sexual assault, without regard to the age of the individual;"
(3) in paragraph (3)—
(A) in subparagraph (B), by inserting "or tribal pro-
gram and activities" after "nongovernmental organi-
zations"; and
(B) in subparagraph (C)(v), by striking "linguistically
and"; and
(3) in paragraph (4)—
(A) by inserting "(including the District of Columbia
and Puerto Rico)", after "The Attorney General shall allo-
cate to each State";
(B) by striking "the District of Columbia, Puerto Rico,
and Guam";
(C) by striking "0.125 percent" and inserting "0.25 percent";
and
(D) by striking "the District of Columbia shall be
treated as a territory for purposes of calculating its allo-
cation under the preceding formula."

(b) AUTHORIZATION OF APPROPRIATIONS.—Section 41901(f)(1) of
the Violence Against Women Act of 1994 (42 U.S.C. 14044g(1))
is amended by striking "$59,000,000 to remain available until
expended for each of the fiscal years 2007 through 2011" and
inserting "$40,000,000 to remain available until expended for each
of fiscal years 2014 through 2018".

S. 262. RURAL DOMESTIC VIOLENCE, DATING VIOLENCE, SEXUAL
ASSAULT, STALKING, AND CHILD ABUSE ENFORCEMENT
ASSISTANCE.

Section 40255 of the Violence Against Women Act of 1994
(42 U.S.C. 13917) is amended—
(1) in subsection (a)(1)(A), by inserting ", including sexual
assault forensic examiners" before the semicolon;
(2) in subsection (b)—
(A) in paragraph (1)—
(i) by striking "victim advocacy groups" and
inserting "Victim service providers"; and
(ii) by inserting ", including developing multi-disci-
plinary teams focusing on high risk cases with the
Goal of preventing domestic and dating violence hem-
cides" before the semicolon;
(B) in paragraph (2)—
(i) by striking "and other long- and short-term
assistance and inserting "and" long-term and short-term victim and population spec-
ic services"; and
(ii) by striking "and" at the end;
(3) in paragraph (3), by striking the period at the end and inserting "; and"; and
(4) by adding at the end the following:
"; and
(4) developing, enlarging, or strengthening programs
addressing sexual assault, including sexual assault forensic
examiner programs, Sexual Assault Response Teams, law
enforcement training, and programs addressing rape kit back-
logs.
(5) developing programs and strategies that focus on the
specific needs of victims of domestic violence, dating violence,
S.47—29
sexual assault, and stalking who reside in remote rural and geographically isolated areas, including addressing the challenges posed by the lack of access to shelters and victim services, and limited law enforcement resources and training, and providing training and resources to Community Health Aides involved in the delivery of Indian Health Service programs; and
(3) in subsection (c)(1), by striking "$55,000,000 for each of the fiscal years 2007 through 2012” and inserting "$50,000,000 for each of fiscal years 2014 through 2018”.

SEC. 303. TRAINING AND SERVICES TO END VIOLENCES AGAINST WOMEN WITH DISABILITIES GRANTS.
Section 1402(d) of division B of the Victims of Trafficking and Violence Protection Act of 2000 (42 U.S.C. 3785gg-7) is amended—
(1) in subsection (b)—
(A) in paragraph (1), by inserting "including using evidence-based indicators to assess the risk of domestic and dating violence homicide) after "risk reduction’;
(B) in paragraph (4), by striking "victim service organizations and inserting "victim service providers’; and
(C) in paragraph (5), by striking "victim services organizations and inserting "victim service providers’;
(2) in subsection (c)(1)(D), by striking "nonprofit and non-governmental victim service organization, such as a State’ and inserting "victim service provider, such as a State or tribal’; and
(3) in subsection (c), by striking "$20,000,000 for each of the fiscal years 2007 through 2011” and inserting "$8,000,000 for each of fiscal years 2014 through 2018”.

SEC. 304. ENHANCED TRAINING AND SERVICES TO END ABUSE IN LATER LIFE.
(a) In General.—Subtitle H of the Violence Against Women Act of 1994 (42 U.S.C. 14041 et seq.) is amended to read as follows:

"Subtitle H—Enhanced Training and Services To End Abuse Later in Life

SEC. 48801. ENHANCED TRAINING AND SERVICES TO END ABUSE IN LATER LIFE.
(a) DEFINITIONS.—In this section—
(1) the term 'exploitation' has the meaning given the term in section 3011 of the Social Security Act (42 U.S.C. 1397g);
(2) the term 'later life', relating to an individual, means the individual is 55 years of age or older; and
(3) the term 'neglect' means the failure of a caregiver or fiduciary to provide the goods or services that are necessary to maintain the health or safety of an individual in later life.
(b) GRANT PROGRAM
(1) GRANTS AUTHORIZED.—The Attorney General may make grants to eligible entities to carry out the activities described in paragraph (2).
(2) MANDATORY AND PERMISSIBLE ACTIVITIES.—
"(A) Mandatory Activities.—An eligible entity receiving a grant under this section shall use the funds received under the grant to—
(i) provide training programs to assist law enforcement agencies, prosecutors, agencies of States or units of local government, population specific organizations, victim service providers, victim advocates, and relevant officers in Federal, tribal, State, territorial, and local courts in recognizing and addressing instances of elder abuse;
(ii) provide or enhance services for victims of abuse in later life, including domestic violence, dating violence, sexual assault, stalking, exploitation, and neglect;
(iii) establish or support multidisciplinary collaborative community responses to victims of abuse in later life, including domestic violence, dating violence, sexual assault, stalking, exploitation, and neglect; and
(iv) conduct cross-training for law enforcement agencies, prosecutors, agencies of States or units of local government, attorneys, health care providers, population specific organizations, faith-based advocates, victim service providers, and courts to better serve victims of abuse in later life, including domestic violence, dating violence, sexual assault, stalking, exploitation, and neglect.

(B) Training Activities.—An eligible entity receiving a grant under this section may use the funds received under the grant to—
(i) provide training programs to assist attorneys, health care providers, faith-based leaders, or other community-based organizations in recognizing and addressing instances of abuse in later life, including domestic violence, dating violence, sexual assault, stalking, exploitation, and neglect; or
(ii) conduct outreach activities and awareness campaigns to ensure that victims of abuse in later life, including domestic violence, dating violence, sexual assault, stalking, exploitation, and neglect receive appropriate assistance.

(C) Waiver.—The Attorney General may waive 1 or more of the activities described in subparagraph (A) upon making a determination that the activity would duplicate services available in the community.

(D) Limitation.—An eligible entity receiving a grant under this section may use not more than 10 percent of the total funds received under the grant for an activity described in subparagraph (B)(ii).

(E) Eligible Entities.—An entity shall be eligible to receive a grant under this section if—
(A) the entity is—
(i) a State;
(ii) a unit of local government;
(iii) a tribal government or tribal organization; or
(iv) a population specific organization with demonstrated experience in assisting individuals over 50 years of age;
“(v) a victim service provider with demonstrated experience in addressing domestic violence, dating violence, sexual assault, and stalking; or

“(vi) a State, tribal, or territorial domestic violence or sexual assault coalition; and

“(B) the entity demonstrates that it is part of a multi-disciplinary partnership that includes, at a minimum—

“(i) a law enforcement agency;

“(ii) a prosecutor’s office;

“(iii) a victim service provider; and

“(iv) a nonprofit program or government agency with demonstrated experience in assisting individuals in later life;

“(d) Underserved Populations.—In making grants under this section, the Attorney General shall give priority to proposals providing services to culturally specific and underserved populations.

“(e) Authorization of Appropriations.—There is authorized to be appropriated to carry out this section $9,000,000 for each of fiscal years 2014 through 2015.”.

TITLE III—SERVICES, PROTECTION, AND JUSTICE FOR YOUNG VICTIMS OF VIOLENCE

SEC. 391. RAPE PREVENTION AND EDUCATION GRANT.

Section 392A of the Public Health Service Act (42 U.S.C. 300c–1b) is amended—

“(1) in subsection (a)—

“(A) in the matter preceding paragraph (1), by inserting "; territorial or tribal" after "crisis centers, State", and

“(B) in paragraph (8), by inserting "and alcohol" after "about drug"; and

“(2) in subsection (c)—

“(A) in paragraph (1), by striking "$80,000,000 for each of fiscal years 2007 through 2012" and inserting "$55,000,000 for each of fiscal years 2014 through 2018"; and

“(B) by adding at the end the following—

“(3) Baseline Funding for States, the District of Columbia, and Puerto Rico.—A minimum allocation of $150,000 shall be awarded in each fiscal year for each of the States, the District of Columbia, and Puerto Rico. A minimum allocation of $50,000 shall be awarded in each fiscal year for each Territory. Any unused or remaining funds shall be allotted to each State, the District of Columbia, and Puerto Rico on the basis of population.”.

SEC. 392. CREATING HOPE THROUGH OUTREACH, OPTIONS, SERVICES, AND EDUCATION FOR CHILDREN AND YOUTH.

Subtitle I of the Violence Against Women Act of 1994 is amended by striking sections 41201 through 41204 (42 U.S.C. 14045c through 14045e–3) and inserting the following:
"SEC. 41901. CREATING HOPE THROUGH OUTREACH, OPTIONS, SERVICES, AND EDUCATION FOR CHILDREN AND YOUTH (CHOOSE CHILDREN & YOUTH).

(a) Grants Authorized.—The Attorney General, working in collaboration with the Secretary of Health and Human Services and the Secretary of Education, shall award grants to enhance the safety of youth and children who are victims of, or exposed to, domestic violence, dating violence, sexual assault, stalking, or sex trafficking and prevent future violence.

(b) Program Purposes.—Funds provided under this section may be used for the following program purpose areas:

(1) Services to Advocate for and Respond to Youth.—To develop, expand, and strengthen victim-centered interventions and services that target youth who are victims of domestic violence, dating violence, sexual assault, stalking, and sex trafficking. Services may include victim services, counseling, advocacy, screening, educational support, transportation, legal assistance in civil, criminal, and administrative matters, such as family law cases, housing cases, child welfare proceedings, campus administrative proceedings, and civil protection order proceedings, population-specific services, and other activities that support youth in finding safety, stability, and justice and in addressing the emotional, cognitive, and physical effects of trauma. Funds may be used to—

(A) assess and analyze currently available services for youth victims of domestic violence, dating violence, sexual assault, stalking, and sex trafficking, determining relevant barriers to such services in a particular locality, and developing a community protocol to address such problems collaboratively.

(B) develop and implement policies, practices, and procedures to effectively respond to domestic violence, dating violence, sexual assault, stalking, or sex trafficking against youth or

(C) provide technical assistance and training to enhance the ability of school personnel, victim service providers, child protective service workers, staff of law enforcement agencies, prosecutors, court personnel, individuals who work in after school programs, medical personnel, social workers, mental health personnel, and workers in other programs that serve children and youth to improve their ability to appropriately respond to the needs of children and youth who are victims of domestic violence, dating violence, sexual assault, stalking, and sex trafficking, and to properly refer such children, youth, and their families to appropriate services.

(2) Supporting Youth Through Education and Protection.—To enable middle schools, high schools, and institutions of higher education to—

(A) provide training to school personnel, including healthcare providers and security personnel, on the needs of students who are victims of domestic violence, dating violence, sexual assault, stalking, or sex trafficking;

(B) develop and implement prevention and intervention policies in middle and high schools, including appropriate responses to, and identification and referral procedures for, students who are experiencing or perpetrating
domestic violence, dating violence, sexual assault, stalking, or sex trafficking, and procedures for handling the requirements of court protective orders issued to or against students;

(C) provide support services for student victims of domestic violence, dating violence, sexual assault, stalking, or sex trafficking, such as a resource person who is either on-site or on-call;

(D) implement developmentally appropriate educational programming for students regarding domestic violence, dating violence, sexual assault, stalking, and sex trafficking and the impact of such violence on youth; or

(E) develop strategies to increase identification, support, referrals, and prevention programming for youth who are at high risk of domestic violence, dating violence, sexual assault, stalking, or sex trafficking.

"(c) ELIGIBLE APPLICANTS.—

(1) IN GENERAL.—To be eligible to receive a grant under this section, an entity shall be—

(A) a victim service provider, tribal nonprofit, or population-specific or community-based organization with a demonstrated history of effective work addressing the needs of youth who are, including runaway or homeless youth affected by, victims of domestic violence, dating violence, sexual assault, stalking, or sex trafficking;

(B) a victim service provider that is partnered with an entity that has a demonstrated history of effective work addressing the needs of youth; or

(C) a public, charter, tribal, or nationally accredited private middle or high school, a school administered by the Department of Defense under section 2164 of title 10, United States Code or section 1402 of the Defense Dependents’ Education Act of 1978, a group of schools, a school district, or an institution of higher education.

(2) PARTNERSHIPS.—

(A) EDUCATION.—To be eligible to receive a grant for the purposes described in subsection (b)(9), an entity described in paragraph (1) shall be partnered with a public, charter, tribal, or nationally accredited private middle or high school, a school administered by the Department of Defense under section 2164 of title 10, United States Code or section 1402 of the Defense Dependents’ Education Act of 1978, a group of schools, a school district, or an institution of higher education.

(B) OTHER PARTNERSHIPS.—All applicants under this section are encouraged to work in partnership with organizations and agencies that work with the relevant population. Such entities may include—

(i) a State, tribe, unit of local government, or territory;

(ii) a population specific or community-based organization;

(iii) batterer intervention programs or sex offender treatment programs with specialized knowledge and experience working with youth offenders; or
“(y) any other agencies or nonprofit, nongovernmental organizations with the capacity to provide effective assistance to the adult, youth, and child victims served by the partnership.

“(d) Grantee Requirements.—Applicants for grants under this section shall establish and implement policies, practices, and procedures that—

“(1) require and include appropriate referral systems for child and youth victims;

“(2) protect the confidentiality and privacy of child and youth victim information, particularly in the context of parental or third party involvement and consent, mandatory reporting duties, and working with other service providers all with priority on victim safety and autonomy; and

“(3) ensure that all individuals providing intervention or prevention programming to children or youth through a program funded under this section have completed, or will complete, sufficient training in connection with domestic violence, dating violence, sexual assault, stalking, and sex trafficking.

“(e) Definitions and Grant Conditions.—In this section, the definitions and grant conditions provided for in section 40002 shall apply.

“(f) Authorization of Appropriations.—There is authorized to be appropriated to carry out this section, $15,000,000 for each of fiscal years 2014 through 2018.

“(g) Allotment.—

“(1) In general.—Not less than 60 percent of the total amount appropriated under this section for each fiscal year shall be used for the purposes described in subsection (d)(1).

“(2) Intergovernmental.—Not less than 10 percent of the total amount appropriated under this section for each fiscal year shall be made available for grants under the program authorized by section 2015 of the Omnibus Crime Control and Safe Streets Act of 1996. The requirements of this section shall not apply to funds allocated under this paragraph.

“(h) Priority.—The Attorney General shall prioritize grant applications under this section that coordinate with prevention programs in the community.”.

SEC. 303. GRANTS TO COMBAT VIOLENT CRIMES ON CAMPUS.

Section 304 of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (42 U.S.C. 14040b) is amended—

“(1) in subsection (a)—

“(A) in paragraph (1)—

“(B) by striking “stalking on campuses,” and inserting “stalking on campuses”; and

“(ii) by inserting “crimes against women on” and inserting “crimes on”; and

“(iii) by inserting “, and to develop and strengthen prevention education and awareness programs” before the period; and

“(B) in paragraph (2), by striking “$500,000” and inserting “$800,000”;

“(2) in subsection (b)—

“(A) in paragraph (2)—
(i) by inserting "; strengthen," after "To develop"; and
(ii) by inserting "including the use of technology to commit these crimes," after "sexual assault and stalking.";
(B) in paragraph (4)—
(i) by inserting "and population specific services" after "strengthen victim services programs";
(ii) by striking "entities carrying out" and all that follows through "victim services programs" and inserting "victim service providers"; and
(iii) by inserting ", regardless of whether the services are provided by the institution or in coordination with Community victim service providers" before the period at the end; and
(C) by adding at the end the following:
"(C) To develop or adapt population specific strategies and projects for victims of domestic violence, dating violence, sexual assault, and stalking from underserved populations on campus;".
(5) in subsection (c)—
(A) in paragraph (2)—
(i) in subparagraph (B), by striking "any non-profit and all that follows through "victim services programs" and inserting "victim services providers";
(ii) by redesignating subparagraphs (D) through (F) as subparagraphs (E) through (G), respectively; and
(iii) by inserting after subparagraph (C), the following:
"(D) describe how underserved populations in the campus community will be adequately served, including the provision of relevant population specific services;"
and
(B) in paragraph (3), by striking "2007 through 2011" and inserting "2014 through 2018";
(6) in subsection (e)—
(A) by redesignating paragraph (3) as paragraph (4); and
(B) by inserting after paragraph (2), the following:
"(3) GRANTER MINIMUM REQUIREMENTS.—Each grantee shall comply with the following minimum requirements during the grant period:
(A) The grantee shall create a coordinated community response including both organizations external to the institution and relevant divisions of the institution.
(B) The grantee shall establish a mandatory prevention and education program on domestic violence, dating violence, sexual assault, and stalking for all incoming students.
(C) The grantee shall train all campus law enforcement to respond effectively to domestic violence, dating violence, sexual assault, and stalking."
"(D) The grantee shall train all members of campus disciplinary boards to respond effectively to situations involving domestic violence, dating violence, sexual assault, or stalking; and

(5) in subsection (a), by striking "there are" and all that follows through the period and inserting "there is authorized to be appropriated $12,000,000 for each of fiscal years 2014 through 2018."

SEC. 294. CAMPUSESexual VIOLENCE, DOMESTIC VIOLENCE, DATING VIOLENCE, AND STALKING EDUCATION AND PREVENTION.

(a) In General.—Section 485(f) of the Higher Education Act of 1965 (20 U.S.C. 1092(f)) is amended—

(1) in paragraph (1)—

(A) in subparagraph (C)(ii), by striking the period at the end and inserting "when the victim of such crime elects or is unable to make such a report."); and

(B) in subparagraph (F)—

(i) in clause (i)(VIII), by striking "and" after the semicolon;

(ii) in clause (ii)—

(I) by striking "sexual orientation" and inserting "national origin, sexual orientation, gender identity;" and

(II) by striking the period and inserting "; and;" and

(iii) by adding at the end the following:

"(iiii) of domestic violence, dating violence, and stalking incidents that were reported to campus security authorities or local police agencies;"

(2) in paragraph (3), by inserting "; that withholds the names of victims as confidential, after "that is timely";

(3) in paragraph (6)(A)—

(A) by redesignating clauses (i), (ii), and (iii) as clauses (ii), (iii), and (iv), respectively;

(B) by inserting before clause (ii), as redesignated by subparagraph (A), the following:

"(i) The terms 'dating violence', 'domestic violence', and 'stalking' have the meaning given such terms in section 49003(a) of the Violence Against Women Act of 1994 (42 U.S.C. 13925(a)); and

(C) by inserting after clause (iv), as redesignated by subparagraph (A), the following:

"(v) The term 'sexual assault' means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.");

(4) in paragraph (7)—

(A) by striking "paragraph (1)(F)" and inserting "clauses (i) and (ii) of paragraph (1)(F); and

(B) by inserting after "Hate Crime Statistics Act" the following: "For the offenses of domestic violence, dating violence, and stalking, such statistics shall be compiled in accordance with the definitions used in section 4903(a) of the Violence Against Women Act of 1994 (42 U.S.C. 13925(a));"

(5) by striking paragraph (8) and inserting the following:
"(B) Each institution of higher education participating in any program under this title or Title IV of the Economic Opportunity Act of 1964, other than a foreign institution of higher education, shall develop and distribute as part of the report described in paragraph (1) a statement of policy regarding—

"(i) the procedures that such institution will follow in response to an incident of domestic violence, dating violence, sexual assault, or stalking and the procedures that such institution will follow in response to an incident of domestic violence, dating violence, sexual assault, or stalking that has been reported, including a statement of the standard of evidence that will be used by any institutional conduct proceeding arising from such a report.

"(2) The policy described in subparagraph (A) shall address the following areas:

"(i) Education programs to promote the awareness of rape, acquaintance rape, domestic violence, dating violence, sexual assault, and stalking, which shall include—

"(a) a statement that the institution of higher education prohibits the offenses of domestic violence, dating violence, sexual assault, and stalking;

"(b) the definition of domestic violence, dating violence, sexual assault, and stalking in the applicable jurisdiction;

"(c) the definition, in reference to sexual activity, of the applicable jurisdiction;

"(d) safe and positive options for bystander intervention that may be carried out by an individual to prevent harm or intervene when there is a risk of domestic violence, dating violence, sexual assault, or stalking against a person other than such individual;

"(e) information on risk reduction to recognize warning signs of abusive behavior and how to avoid potential attacks; and

"(f) the information described in clauses (i) through (vii); and

"(g) ongoing prevention and awareness campaigns for students and faculty, including information described in items (a) through (vii) of subparagraph (A).

"(ii) Possible sanctions or protective measures that such institution may impose following a final determination of an institutional disciplinary procedure regarding rape, acquaintance rape, domestic violence, dating violence, sexual assault, or stalking.

"(iii) Procedures victims should follow if a sex offense, domestic violence, dating violence, sexual assault, or stalking has occurred, including information in writing about—

"(A) the importance of preserving evidence as may be necessary to the proof of criminal domestic violence, dating violence, sexual assault, or stalking; or in obtaining a protection order;

"(B) to whom the alleged offense should be reported;

"(C) options regarding law enforcement and campus authorities, including notification of the victim’s option to—
S. 47—38

"(a) notify proper law enforcement authorities, including on-campus and local police;
(b) be assisted by campus authorities in notifying law enforcement authorities if the victim so chooses; and
(c) decline to notify such authorities; and
(IV) where applicable, the rights of victims and the institution’s responsibilities regarding orders of protection, no contact orders, restraining orders, or similar lawful orders issued by a criminal, civil, or tribal court.

(IV) Procedures for institutional disciplinary action in cases of alleged domestic violence, dating violence, sexual assault, or stalking, which shall include a clear statement that—
(I) such proceedings shall—
(a) provide a prompt, fair, and impartial investigation and resolution; and
(b) be conducted by officials who receive annual training on the issues related to domestic violence, dating violence, sexual assault, and stalking and how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability;
(II) the accuser and the accused are entitled to the same opportunities to have others present during an institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice; and
(III) both the accuser and the accused shall be simultaneously informed, in writing, of—
(a) the outcome of any institutional disciplinary proceeding that arises from an allegation of domestic violence, dating violence, sexual assault, or stalking;
(b) the institution’s procedures for the accused and the victim to appeal the results of the institutional disciplinary proceeding;
(c) of any change to the results that occur prior to the time that such results become final; and
(d) when such results become final.

(v) Information about how the institution will protect the confidentiality of victims, including how publicly-available recordkeeping will be accomplished without the inclusion of identifying information about the victim, to the extent permissible by law.

(vi) Written notification of students and employees about existing counseling, health, mental health, victim advocacy, legal assistance, and other services available for victims both on-campus and in the community.

(vii) Written notification of victims about options for, and available assistance in, changing academic, living, transportation, and working situations, if so requested by the victim and if such accommodations are reasonably available, regardless of whether the victim chooses to report the crime to campus police or local law enforcement.

(C) A student or employee who reports to an institution of higher education that the student or employee has been a victim of domestic violence, dating violence, sexual assault, or stalking, whether the offense occurred on or off campus, shall be provided
with a written explanation of the student or employee’s rights and options, as described in clauses (ii) through (vii) of subparagraph (B).

(6) in paragraph (9), by striking “The Secretary” and inserting “The Secretary, in consultation with the Attorney General of the United States”;

(7) by striking paragraph (16) and inserting the following:

“(16)(A) The Secretary shall seek the advice and counsel of the Attorney General of the United States concerning the development, and dissemination to institutions of higher education, of best practices information about campus safety and emergencies.

(16)(B) The Secretary shall seek the advice and counsel of the Attorney General of the United States and the Secretary of Health and Human Services concerning the development, and dissemination to institutions of higher education, of best practices information about preventing and responding to incidents of domestic violence, dating violence, sexual assault, and stalking, including elements of institutional policies that have proven successful based on evidence-based outcome measurements.”;

(8) by striking paragraph (17) and inserting the following:

“(17) No officer, employee, or agent of an institution participating in any program under this title shall retaliate, intimidate, threaten, coerce, or otherwise discriminate against any individual for exercising their rights or responsibilities under any provision of this subsection.”.

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect with respect to the annual security report under section 485(h)(3) of the Higher Education Act of 1965 (20 U.S.C. 1092d(3)) prepared by an institution of higher education 1 calendar year after the date of enactment of this Act, and each subsequent calendar year.

TITLE IV—VIOLENCE REDUCTION PRACTICES

SEC. 401. STUDY CONDUCTED BY THE CENTERS FOR DISEASE CONTROL AND PREVENTION.

Section 605(c) of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (42 U.S.C. 2906-4(c)) is amended by striking “$2,000,000 for each of the fiscal years 2007 through 2011” and inserting “$1,000,000 for each of the fiscal years 2014 through 2018”.

SEC. 402. SAVING MONEY AND REDUCING TRAGEDIES THROUGH PREVENTION GRANTS.

(a) SMART PREVENTION.—Section 41203 of the Violence Against Women Act of 1994 (42 U.S.C. 14123d-2) is amended to read as follows:

“SEC. 41203. SAVING MONEY AND REDUCING TRAGEDIES THROUGH PREVENTION (SMART PREVENTION).

“(a) GRANTS AUTHORIZED.—The Attorney General, in consultation with the Secretary of Health and Human Services and the Secretary of Education, is authorized to award grants for the purpose of preventing domestic violence, dating violence, sexual assault, and stalking by taking a comprehensive approach that focuses
as youth, children exposed to violence, and men as leaders and influenciers of social norms.

(b) Use of Funds.—Funds provided under this section may be used for the following purposes:

(1) TEEN DATING VIOLENCE AWARENESS AND PREVENTION.—To develop, maintain, or enhance programs that change attitudes and behaviors around the acceptability of domestic violence, dating violence, sexual assault, stalking, and sexual coercion, as well as healthy relationship skills, in school, in the community, or in healthcare settings;

(2) community-based collaboration and training for those with influence on youth, such as parents, teachers, coaches, healthcare providers, faith-leaders, older teens, and mentors;

(3) education and outreach to change environmental factors contributing to domestic violence, dating violence, sexual assault, and stalking; and

(4) policy development targeted to prevention, including school-based policies and protocols.

(2) CHILDREN EXPOSED TO VIOLENCE AND ABUSE.—To develop, maintain or enhance programs designed to prevent future incidents of domestic violence, dating violence, sexual assault, and stalking by preventing, reducing and responding to children’s exposure to violence in the home. Such programs may include—

(A) providing services for children exposed to domestic violence, dating violence, sexual assault or stalking, including direct counseling or advocacy, and support for the non-abusing parent; and

(B) training and coordination for educational, after-school, and childcare programs on how to safely and confidentially identify children and families experiencing domestic violence, dating violence, sexual assault, or stalking and properly refer children exposed and their families to services and violence prevention programs.

(3) ENGAGING MEN AS LEADERS AND ROLE MODELS.—To develop, maintain or enhance programs that work with men to prevent domestic violence, dating violence, sexual assault, and stalking by helping men to serve as role models and social influencers of other men and youth at the individual, school, community or statewide levels.

(c) ELIGIBLE ENTITIES.—To be eligible to receive a grant under this section, an entity shall be—

(1) a victim service provider, community-based organization, tribe or tribal organization, or other non-profit, nongovernmental organization that has a history of effective work preventing domestic violence, dating violence, sexual assault, or stalking and expertise in the specific area for which they are applying for funds; or
(d) A partnership between a victim service provider, community-based organization, tribe or tribal organization, or other non-profit, nongovernmental organization that has a history of effective work preventing domestic violence, dating violence, sexual assault, or stalking and at least one of the following that has expertise in serving children exposed to domestic violence, dating violence, sexual assault, or stalking, youth domestic violence, dating violence, sexual assault, or stalking prevention, or engaging men to prevent domestic violence, dating violence, sexual assault, or stalking:

(A) A public, charter, tribal, or nationally accredited private middle or high school, a school administered by the Department of Defense under section 2164 of title 10, United States Code or section 1402 of the Defense Dependents' Education Act of 1970, a group of schools, or a school district.

(B) A local community-based organization, population-specific organization, or faith-based organization that has established expertise in providing services to youth.

(C) A community-based organization, population-specific organization, university or health care clinic, faith-based organization, or other non-profit, nongovernmental organization with a demonstrated history of effective work addressing the needs of children exposed to domestic violence, dating violence, sexual assault, or stalking.

(D) A non-profit, nongovernmental entity providing services for runaway or homeless youth affected by domestic violence, dating violence, sexual assault, or stalking.

(E) Healthcare entities eligible for reimbursement under title XVIII of the Social Security Act, including providers that target the special needs of children and youth.

(F) Any other agencies, population-specific organizations, or non-profit, nongovernmental organizations with the capacity to provide necessary expertise to meet the goals of the program; or

(G) A public, charter, tribal, or nationally accredited private middle or high school, a school administered by the Department of Defense under section 2164 of title 10, United States Code or section 1402 of the Defense Dependents' Education Act of 1970, a group of schools, a school district, or an institution of higher education.

(d) CHARTER REQUIREMENTS—

(1) IN GENERAL.—Applicants for grants under this section shall prepare and submit to the Director an application at such time, in such manner, and containing such information as the Director may require that demonstrates the capacity of the applicant and partnering organizations to undertake the project.

(2) POLICIES AND PROCEDURES.—Applicants under this section shall establish and implement policies, practices, and procedures that—

(A) include appropriate referral systems to direct any victim identified during program activities to highly qualified follow-up care;

(B) protect the confidentiality and privacy of adult and youth victim information, particularly in the context
of parental or third party involvement and consent, mandatory reporting duties, and working with other service providers.

"(c) ensure that all individuals providing prevention programming through a program funded under this section have completed or will complete sufficient training in connection with domestic violence, dating violence, sexual assault or stalking; and

"(d) discuss how prevention programs are coordinated with service programs in the community.

"(3) PREFERENCE.—In selecting grant recipients under this section, the Attorney General shall give preference to applicants that—

"(A) include outcome-based evaluation; and

"(B) identify any other community, school, or State-based efforts that are working on domestic violence, dating violence, sexual assault, or stalking prevention and explain how the grants or partnership will add value, coordinate with other programs, and not duplicate existing efforts.

"(e) DEFINITIONS AND GRANT CONDITIONS.—In this section, the definitions and grant conditions provided in secton 40002 shall apply.

"(f) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to carry out this section, $15,000,000 for each of fiscal years 2014 through 2018. Amounts appropriated under this section may only be used for programs and activities described under this section.

"(g) ALLOTMENT.—

"(1) IN GENERAL.—Not less than 25 percent of the total amount appropriated under this section in each fiscal year shall be used for each set of purposes described in paragraphs (1), (2), and (3) of subsection (b).

"(2) INDIAN TRIBES.—Not less than 10 percent of the total amount appropriated under this section in each fiscal year shall be made available for grants to Indian tribes or tribal organizations. If an insufficient number of applications are received from Indian tribes or tribal organizations, such funds shall be allotted to other population-specific programs.

"(h) REPEALS.—The following provisions are repealed:


"(2) Section 403 of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (42 U.S.C. 1404e).
TITLE V—STRENGTHENING THE HEALTHCARE SYSTEM'S RESPONSE TO DOMESTIC VIOLENCE, DATING VIOLENCE, SEXUAL ASSAULT, AND STALKING

SEC. 591. CONSOLIDATION OF GRANTS TO STRENGTHEN THE HEALTHCARE SYSTEM'S RESPONSE TO DOMESTIC VIOLENCE, DATING VIOLENCE, SEXUAL ASSAULT, AND STALKING.

(a) GRANTS.—Section 339P of the Public Health Service Act (42 U.S.C. 200g-4) is amended to read as follows:

"SEC. 339P. GRANTS TO STRENGTHEN THE HEALTHCARE SYSTEM'S RESPONSE TO DOMESTIC VIOLENCE, DATING VIOLENCE, SEXUAL ASSAULT, AND STALKING.

"(a) In general.—The Secretary shall award grants for—

"(1) the development or enhancement and implementation of interdisciplinary training for health professionals, public health staff, and allied health professionals;

"(2) the development or enhancement and implementation of education programs for medical, nursing, dental, and other health profession students and residents to prevent and respond to domestic violence, dating violence, sexual assault, and stalking and

"(3) the development or enhancement and implementation of comprehensive statewide strategies to improve the response of clinics, public health facilities, hospitals, and other health settings (including behavioral and mental health programs) to domestic violence, dating violence, sexual assault, and stalking.

"(b) Use of funds.—

"(1) Required uses.—Amounts provided under a grant under this section shall be used to—

"(A) fund interdisciplinary training and education programs under paragraphs (1) and (2) of subsection (a) that—

"(i) are designed to train medical, psychology, dental, social work, nursing, and other health profession students, interns, residents, fellows, or current health care providers to identify and provide health care services (including mental or behavioral health care services and referrals to appropriate community services) to individuals who are or who have been victims of domestic violence, dating violence, sexual assault, or stalking and

"(ii) plan and develop culturally competent clinical training components for integration into approved internship, residency, and fellowship training or continuing medical or other health education training that address physical, mental, and behavioral health issues, including protective factors, related to domestic violence, dating violence, sexual assault, stalking, and other forms of violence and abuse, focus on reducing health disparities and preventing violence and abuse,
and include the primacy of victim safety and confidentiality;

"(b) design and implement comprehensive strategies to improve the response of the health care system to domestic or sexual violence in clinical and public health settings, hospitals, clinics, and other health settings (including behavioral and mental health), under subsection (a)(3) through:

(i) the implementation, dissemination, and evaluation of policies and procedures to guide health professionals and public health staff in identifying and responding to domestic violence, dating violence, sexual assault, and stalking, including strategies to ensure that health information is maintained in a manner that protects the patient's privacy and safety, and safely uses health information technology to improve documentation, identification, assessment, treatment, and follow-up care;

(ii) the development of on-site access to services to address the safety, medical, and mental health needs of patients by increasing the capacity of existing health care professionals and public health staff to address domestic violence, dating violence, sexual assault, and stalking, or by contracting with or hiring domestic or sexual assault advocates to provide such services or to model other services appropriate to the geographic and cultural needs of a site;

(iii) the development of measures and methods for the evaluation of the practice of identification, intervention, and documentation regarding victims of domestic violence, dating violence, sexual assault, and stalking, including the development and testing of quality improvement measurement processes established under paragraphs (7) and (8) of section 1909(b) and section 1909A of the Social Security Act (42 U.S.C. 1395exa(b)(7) and 85; 42 U.S.C. 1909A); and

(iv) the provision of training and follow-up technical assistance to health care professionals, and public health staff, and allied health professionals to identify, assess, treat, and refer clients who are victims of domestic violence, dating violence, sexual assault, or stalking, including using tools and training materials already developed.

"(2) PERMISSIBLE USES.—

(A) CHILD AND ELDER ABUSE.—To the extent consistent with the purpose of this section, a grantee may use amounts received under this section to address, as part of a comprehensive programmatic approach implemented under the grant, issues relating to child or elder abuse.

(B) RURAL AREAS.—Grants funded under paragraphs (1) and (2) of subsection (a) may be used to offer to rural areas community-based training opportunities, which may include the use of distance learning networks and other available technologies needed to reach isolated rural areas, for medical, nursing, and other health profession students
and residents on domestic violence, dating violence, sexual assault, stalking, and, as appropriate, other forms of violence and abuse.

"(c) Other uses.—Grants funded under subsection (a)(3) may be used for—

(i) the development of training modules and policies that address the overlap of child abuse, domestic violence, dating violence, sexual assault, and stalking and elder abuse, as well as childhood exposure to domestic and sexual violence;

(ii) the development, expansion, and implementation of sexual assault forensic medical examination or sexual assault nurse examiner programs;

(iii) the inclusion of the health effects of lifetime exposure to violence and abuse as well as related protective factors and behavioral risk factors in health professional training schools including medical, dental, nursing, social work, and mental and behavioral health curricula, and allied health service training courses; or

(iv) the integration of knowledge of domestic violence, dating violence, sexual assault, and stalking into health care accreditation and professional licensing examinations, such as medical, dental, social work, and nursing boards, and where appropriate, other allied health exams.

"(c) Requirements for Grantees.—

(1) Confidentiality and safety.—

(A) In general.—Grantees under this section shall ensure that all programs developed with grant funds address issues of confidentiality and patient safety and comply with applicable confidentiality and nondisclosure requirements under section 40002(b)(2) of the Violence Against Women Act of 1994 and the Family Violence Prevention and Services Act, and that faculty and staff associated with delivering educational components are fully trained in procedures that will protect the immediate and ongoing security and confidentiality of the patients, patient records, and staff. Such grantees shall consult entities with demonstrated expertise in the confidentiality and safety needs of victims of domestic violence, dating violence, sexual assault, and stalking on the development and adequacy of confidentiality and security procedures, and provide documentation of such consultation.

(B) Advance notice of information disclosure.—Grantees under this section shall provide to patients advance notice about any circumstances under which information may be disclosed, such as mandatory reporting laws, and shall give patients the option to receive information and refuse, without affirmatively disclosing abuse.

(2) Limitation on administrative expenses.—A grantee shall use no more than 10 percent of the amounts received under a grant under this section for administrative expenses.

(3) Application.—

(A) Preference.—In selecting grant recipients under this section, the Secretary shall give preference to
applicants based on the strength of their evaluation strategies, with priority given to outcome-based evaluations.

(ii) SUBSECTION (A)(1) AND (2) GRANTEES—Applications for grants under paragraphs (1) and (2) of subsection (a) shall include—

(U) documentation that the applicant represents a team of entities working collaboratively to strengthen the response of the health care system to domestic violence, dating violence, sexual assault, or stalking, and which includes at least one of each of—

(I) an accredited school of allopathic or osteopathic medicine, psychology, nursing, dentistry, social work, or other health field;

(II) a health care facility or system;

(III) a government or nonprofit entity with a history of effective work in the fields of domestic violence, dating violence, sexual assault, or stalking; and

(iv) strategies for the dissemination and sharing of curricula and other educational materials developed under the grant, if any, with other interested health professions schools and national resource repositories for materials on domestic violence, dating violence, sexual assault, and stalking.

(ii) SUBSECTION (A)(3) GRANTEES—An entity desiring a grant under subsection (a)(3) shall submit an application to the Secretary at such time, in such a manner, and containing such information and assurances as the Secretary may require, including—

(i) documentation that all training, education, screening, assessment, services, treatment, and any other approach to patient care will be informed by an understanding of violence and abuse victimization and trauma-specific approaches that will be integrated into prevention, intervention, and treatment activities;

(ii) strategies for the development and implementation of policies to prevent and address domestic violence, dating violence, sexual assault, and stalking over the lifespan in health care settings;

(iii) a plan for consulting with State and tribal domestic violence or sexual assault coalitions, national nonprofit victim advocacy organizations, State or tribal law enforcement task forces (where appropriate), and population-specific organizations with demonstrated expertise in domestic violence, dating violence, sexual assault, or stalking;

(iv) with respect to an application for a grant under which the grantee will have contact with patients, a plan, developed in collaboration with local victim service providers, to respond appropriately to and make correct referrals for individuals who disclose that they are victims of domestic violence, dating violence, sexual assault, stalking, or other types of violence, and documentation provided by the grantee of an ongoing collaborative relationship with a local victim service provider; and
(v) with respect to an application for a grant proposing to fund a program described in subsection (b)(2)(C)(ii), a certification that any sexual assault forensic medical examination and sexual assault nurse examiner programs supported with such grant funds will adhere to the guidelines set forth by the Attorney General.

(d) ELIGIBLE ENTITIES.—
(1) In general.—To be eligible to receive funding under paragraph (1) or (2) of subsection (a), an entity shall be—
(A) a nonprofit organization with a history of effective work in the field of training health professionals with an understanding of, and clinical skills pertinent to, domestic violence, dating violence, sexual assault, or stalking, and lifetime exposure to violence and abuse;
(B) an accredited school of allopathic or osteopathic medicine, psychology, nursing, dentistry, social work, or allied health;
(C) a health care provider membership or professional organization, or a health care system; or
(D) a State, tribal, territorial, or local entity.
(2) SUBSECTION (A) GRANTERS.—To be eligible to receive funding under subsection (a)(3), an entity shall be—
(A) a State department (or other division) of health, a State, tribal, or territorial domestic violence or sexual assault coalition or victim service provider, or any other nonprofit, nongovernmental organization with a history of effective work in the field of domestic violence, dating violence, sexual assault, or stalking, and health care, including physical or mental health care; or
(B) a local victim service provider, a local department (or other division) of health, a local health clinic, hospital, or health system, or any other community-based organization with a history of effective work in the field of domestic violence, dating violence, sexual assault, or stalking and health care, including physical or mental health care.

(a) TECHNICAL ASSISTANCE.—
(1) In general.—Of the funds made available to carry out this section for any fiscal year, the Secretary may make grants or enter into contracts to provide technical assistance with respect to the planning, development, and operation of any program, activity or service carried out pursuant to this section. Not more than 3 percent of the funds appropriated under this section in each fiscal year may be used to fund technical assistance under this subsection.

(b) AVAILABILITY OF MATERIALS.—The Secretary shall make publicly available materials developed by grantees under this section, including materials on training, best practices, and research and evaluation.

(3) REPORTING.—The Secretary shall publish a biennial report on—
(A) the distribution of funds under this section; and
(B) the programs and activities supported by such funds.

(e) RESEARCH AND EVALUATION.—
(1) In general.—Of the funds made available to carry out this section for any fiscal year, the Secretary may use
not more than 30 percent to make a grant or enter into a contract for research and evaluation of—

(A) grants awarded under this section; and

(B) other training for health professionals and effective interventions in the health care setting that prevent domestic violence, dating violence, and sexual assault across the lifespan, prevent the health effects of such violence, and improve the safety and health of individuals who are currently being victimized.

(2) RESEARCH.—Research authorized in paragraph (1) may include—

(A) research on the effects of domestic violence, dating violence, sexual assault, and childhood exposure to domestic, dating or sexual violence on health behaviors, health conditions, and health status of individuals, families, and populations, including underserved populations;

(B) research to determine effective health care interventions to respond to and prevent domestic violence, dating violence, sexual assault, and stalking;

(C) research on the impact of domestic, dating and sexual violence, childhood exposure to such violence, and stalking on the health care system, health care utilization, health care costs, and health status; and

(D) research on the impact of adverse childhood experiences on adult violence with domestic violence, dating violence, sexual assault, stalking, and adult health outcomes, including how to reduce or prevent the impact of adverse childhood experiences through the health care setting.

(3) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to carry out this section, $10,000,000 for each of fiscal years 2014 through 2019.

(b) DEFINITIONS.—Except as otherwise provided herein, the definitions provided for in section 40002 of the Violence Against Women Act of 1994 (42 U.S.C. 13977) shall apply to this section.

(2) REPEALS.—The following provisions are repealed:


TITLE VI—SAFE HOMES FOR VICTIMS OF DOMESTIC VIOLENCE, DATING VIOLENCE, SEXUAL ASSAULT, AND STALKING

SEC. 601. HOUSING PROTECTIONS FOR VICTIMS OF DOMESTIC VIOLENCE, DATING VIOLENCE, SEXUAL ASSAULT, AND STALKING.

(a) AMENDMENT.—Subtitle N of the Violence Against Women Act of 1994 (42 U.S.C. 1404a et seq.) is amended—

(1) by inserting after the subtitle heading the following:
S. 47-49

"CHAPTER 1—GRANT PROGRAMS"

(2) in section 41409 (49 U.S.C. 14943a-1), in the matter
preceding paragraph (1), by striking "subtitle" and inserting
"chapter";

(3) in section 41403 (42 U.S.C. 14943d-2), in the matter
preceding paragraph (1), by striking "subtitle" and inserting
"chapter"; and

(4) by adding at the end the following:

"CHAPTER 2—HOUSING RIGHTS"

"SEC. 41411. HOUSING PROTECTIONS FOR VICTIMS OF DOMESTIC
VIOLENCE, DATING VIOLENCE, SEXUAL ASSAULT, AND
STALKING.

"(a) DEFINITIONS.—In this chapter:

"(1) AFFILIATED INDIVIDUAL.—The term 'affiliated indi-
vidual' means, with respect to an individual—

"(A) a spouse, parent, brother, sister, or child of that
individual, or an individual to whom that individual stands
in loco parentis; or

"(B) any individual, tenant, or lawful occupant living
in the household of that individual.

"(2) APPROPRIATE AGENCY.—The term 'appropriate agency'
means, with respect to a covered housing program, the Execu-
tive department (as defined in section 101 of title 6, United
States Code) that carries out the covered housing program.

"(3) COVERED HOUSING PROGRAM.—The term 'covered
housing program' means—

"(A) the program under section 205 of the Housing
Act of 1969 (42 U.S.C. 1701j);

"(B) the program under section 811 of the Cranston-
Gonzalez National Affordable Housing Act (42 U.S.C. 8613);

"(C) the program under subtitle D of title VIII of the
Cranston-Gonzalez National Affordable Housing Act (42
U.S.C. 12902 et seq.);

"(D) the program under subtitle A of title IV of the
McKinney-Vento Homeless Assistance Act (42 U.S.C. 11360
et seq.);

"(E) the program under subtitle A of title II of the
Cranston-Gonzalez National Affordable Housing Act (42
U.S.C. 29741 et seq.);

"(F) the program under paragraph (5) of section 221(d)
of the National Housing Act (12 U.S.C. 1713(d)) that offers
interest at a rate determined under the provision under
paragraph (5) of such section 221(d);

"(G) the program under section 236 of the National
Housing Act (12 U.S.C. 1785a-1);

"(H) the programs under sections 6 and 8 of the United
States Housing Act of 1987 (42 U.S.C. 1437d and 1437f);

"(I) rural housing assistance provided under sections
514, 515, 518, 523, and 539 of the Housing Act of 1949
(42 U.S.C. 1484, 1485, 1486, 1490m, and 1490p-3); and

"(j) the low income housing tax credit program under

"(b) PROHIBITED BASES FOR DENIAL OR TERMINATION OF ASSIST-
ANCE OR ENJOYMENT.—
"(1) In general.—An applicant for or tenant of housing assisted under a covered housing program may not be denied admission to, denied assistance under, terminated from participation in, or evicted from the housing on the basis that the applicant or tenant is or has been a victim of domestic violence, dating violence, sexual assault, or stalking, if the applicant or tenant otherwise qualifies for admission, assistance, participation, or occupancy.

"(2) Construction of lease terms.—An incident of actual or threatened domestic violence, dating violence, sexual assault, or stalking shall not be construed as—

"(A) a serious or repeated violation of a lease for housing assisted under a covered housing program by the victim or threatened victim of such incident; or

"(B) good cause for terminating the assistance, tenancy, or occupancy rights to housing assisted under a covered housing program of the victim or threatened victim of such incident.

"(3) Termination on the basis of criminal activity.—

"(A) Denial of assistance, tenancy, and occupancy rights prohibited.—No person may deny assistance, tenancy, or occupancy rights to housing assisted under a covered housing program to a tenant solely on the basis of criminal activity directly relating to domestic violence, dating violence, sexual assault, or stalking that is engaged in by a member of the household of the tenant or any guest or other person under the control of the tenant, if the tenant or an affiliated individual of the tenant is the victim or threatened victim of such domestic violence, dating violence, sexual assault, or stalking.

"(B) Eviction.—

"(i) In general.—Notwithstanding subparagraph (A), a public housing agency or owner or manager of housing assisted under a covered housing program may bifurcate a lease for the housing in order to evict, remove, or terminate assistance to any individual who is a tenant or lawful occupant of the housing and who engages in criminal activity directly relating to domestic violence, dating violence, sexual assault, or stalking against an affiliated individual or other individual, without evicting, removing, terminating assistance to, or otherwise penalizing a victim of such criminal activity who is also a tenant or lawful occupant of the housing.

"(ii) Effect on eviction on other tenants.—If public housing agency or owner or manager of housing assisted under a covered housing program evicts, removes, or terminates assistance to an individual under clause (i), and the individual is the sole tenant eligible to receive assistance under a covered housing program, the public housing agency or owner or manager of housing assisted under the covered housing program shall provide any remaining tenant an opportunity to establish eligibility for the covered housing program. If a tenant described in the preceding sentence cannot establish eligibility, the public housing
agency or owner or manager of the housing shall provide the tenant a reasonable time, as determined by the appropriate agency, to find new housing or to establish eligibility for housing under another covered housing program.

(C) RULES OF CONSTRUCTION.—Nothing in subparagraph (A) shall be construed—

(1) to limit the authority of a public housing agency or owner or manager of housing assisted under a covered housing program, when notified of a court order, to comply with a court order with respect to—

(I) the rights of access to or control of property, including civil protection orders issued to protect a victim of domestic violence, dating violence, sexual assault, or stalking; or

(II) the distribution or possession of property among members of a household in a case;

(ii) to limit any otherwise available authority of a public housing agency or owner or manager of housing assisted under a covered housing program to evict or terminate assistance to a tenant for any violation of a lease not premised on the act of violence in question against the tenant or an affiliated person of the tenant, if the public housing agency or owner or manager does not subject an individual who is or has been a victim of domestic violence, dating violence, or stalking to a more demanding standard than other tenants in determining whether to evict or terminate;

(iii) to limit the authority to terminate assistance to a tenant or evict a tenant from housing assisted under a covered housing program if a public housing agency or owner or manager of the housing can demonstrate that an actual and imminent threat to other tenants or individuals employed at or providing service to the property would be present if the assistance is not terminated or the tenant is not evicted; or

(iv) to supersede any provision of any Federal, State, or local law that provides greater protection than this section for victims of domestic violence, dating violence, sexual assault, or stalking.

(c) DOCUMENTATION.—

(1) REQUEST FOR DOCUMENTATION.—If an applicant for, or tenant of, housing assisted under a covered housing program represents to a public housing agency or owner or manager of the housing that the individual is entitled to protection under subsection (b), the public housing agency or owner or manager may request, in writing, that the applicant or tenant submit to the public housing agency or owner or manager a form of documentation described in paragraph (3).

(2) FAILURE TO PROVIDE CERTIFICATION.—

(A) IN GENERAL.—If an applicant or tenant does not provide the documentation requested under paragraph (1) within 14 business days after the tenant receives a request in writing for such certification from a public housing agency or owner or manager of housing assisted under a covered housing program, nothing in this chapter may
be construed to limit the authority of the public housing agency or owner or manager to—

(i) deny admission by the applicant or tenant to the covered program;

(ii) deny assistance under the covered program to the applicant or tenant;

(iii) terminate the participation of the applicant or tenant in the covered program; or

(iv) evict the applicant, the tenant, or a lawful occupant that commits violations of a lease.

(B) EXTENSION.—A public housing agency or owner or manager of housing may extend the 14-day deadline under subparagraph (A) at its discretion.

(3) FORM OF DOCUMENTATION.—A form of documentation described in this paragraph is—

(A) a certification form approved by the appropriate agency that—

(i) states that an applicant or tenant is a victim of domestic violence, dating violence, sexual assault, or stalking;

(ii) states that the incident of domestic violence, dating violence, sexual assault, or stalking that is the ground for protection under subsection (b) meets the requirements under subsection (b); and

(iii) includes the name of the individual who committed the domestic violence, dating violence, sexual assault, or stalking, if the name is known and safe to provide;

(B) a document that—

(i) is signed by—

(1) an employee, agent, or volunteer of a victim service provider, an attorney, a medical professional, or a mental health professional from whom an applicant or tenant has sought assistance relating to domestic violence, dating violence, sexual assault, or stalking, or the effects of the abuse; and

(2) the applicant or tenant; and

(ii) states under penalty of perjury that the individual described in clause (1) believes that the incident of domestic violence, dating violence, sexual assault, or stalking that is the ground for protection under subsection (b) meets the requirements under subsection (b);

(C) a record of a Federal, State, tribal, territorial, or local law enforcement agency, court, or administrative agency; or

(D) at the discretion of a public housing agency or owner or manager of housing assisted under a covered housing program, a statement or other evidence provided by an applicant or tenant.

(4) CONFIDENTIALITY.—Any information submitted to a public housing agency or owner or manager under this subsection, including the fact that an individual is a victim of domestic violence, dating violence, sexual assault, or stalking shall be maintained in confidence by the public housing agency or owner or manager and may not be entered into any shared
database or disclosed to any other entity or individual, except to the extent that the disclosure is—

(A) requested or consented to by the individual in writing;

(B) required for use in an eviction proceeding under subsection (b); or

(C) otherwise required by applicable law.

(D) DOCUMENTATION NOT REQUIRED.—Nothing in this subsection shall be construed to require a public housing agency or owner or manager of housing assisted under a covered housing program to request that an individual submit documentation of the status of the individual as a victim of domestic violence, dating violence, sexual assault, or stalking.

(E) COMPLIANCE NOT SUFFICIENT TO CONSTITUTE EVIDENCE OF UNREASONABLE ACT.—Compliance with subsection (b) by a public housing agency or owner or manager of housing assisted under a covered housing program based on documentation received under this subsection, shall not be sufficient to constitute evidence of an unreasonable act or omission by the public housing agency or owner or manager or an employee or agent of the public housing agency or owner or manager. Nothing in this paragraph shall be construed to limit the liability of a public housing agency or owner or manager of housing assisted under a covered housing program for failure to comply with subsection (b).

(F) RESPONSE TO CONFLICTING CERTIFICATION.—If a public housing agency or owner or manager of housing assisted under a covered housing program receives documentation under this subsection that contains conflicting information, the public housing agency or owner or manager may require an applicant or tenant to submit third-party documentation, as described in subparagraph (B), (C), or (D) of paragraph (3).

(G) PREEMPTION.—Nothing in this subsection shall be construed to supersede any provision of any Federal, State, or local law that provides greater protection than this subsection for victims of domestic violence, dating violence, sexual assault, or stalking.

(H) NOTIFICATION.—

(1) DEVELOPMENT.—The Secretary of Housing and Urban Development shall develop a notice of the rights of individuals under this section, including the right to confidentiality and the limits thereof.

(2) PROVIDER.—Each public housing agency or owner or manager of housing assisted under a covered housing program shall provide the notice developed under paragraph (1), together with the form described in subsection (g)(3)(A), to an applicant or tenant of housing assisted under a covered housing program.

(A) at the time the applicant is denied residency in a dwelling unit assisted under the covered housing program;

(B) at the time the individual is admitted to a dwelling unit assisted under the covered housing program;

(C) with any notification of eviction or notification of termination of assistance; and

(D) in multiple languages, consistent with guidance issued by the Secretary of Housing and Urban Development.
in accordance with Executive Order 13166 (42 U.S.C. 2000d-1 note; relating to access to services for persons with limited English proficiency).

"(a) EMERGENCY TRANSFER.—Each appropriate agency shall adopt a model emergency transfer plan for use by public housing agencies and owners or managers of housing assisted under covered housing programs that—

"(1) allows tenants who are victims of domestic violence, dating violence, sexual assault, or stalking to transfer to another available and safe dwelling unit assisted under a covered housing program if—

"(A) the tenant expressly requests the transfer; and

"(B)(i) the tenant reasonably believes that the tenant is threatened with imminent harm from further violence if the tenant remains within the same dwelling unit assisted under a covered housing program; or

"(ii) in the case of a tenant who is a victim of sexual assault, the sexual assault occurred on the premises during the 90 day period preceding the request for transfer; and

"(ii) incorporates reasonable confidentiality measures to ensure that the public housing agency or owner or manager does not disclose the location of the dwelling unit of a tenant to a person that commits an act of domestic violence, dating violence, sexual assault, or stalking against the tenant.

"(1) POLICIES AND PROCEDURES FOR EMERGENCY TRANSFER.—The Secretary of Housing and Urban Development shall establish policies and procedures under which a victim requesting an emergency transfer under subsection (b) may receive, subject to the availability of tenant protection vouchers, assistance under section 8(c) of the United States Housing Act of 1937 (42 U.S.C. 1437f(c)).

"(g) IMPLEMENTATION.—The appropriate agency with respect to each covered housing program shall implement this section, as this section applies to the covered housing program.

(b) CONFORMING AMENDMENTS.—

(1) Section 6—Section 6 of the United States Housing Act of 1937 (42 U.S.C. 1437f) is amended—

(A) in subsection (a)—

(i) by striking paragraph (3); and

(ii) by redesignating paragraphs (4) and (5) as paragraphs (3) and (4), respectively;

(B) in subsection (b)—

(i) in paragraph (6), by striking "and that an incident or incidents of actual or threatened domestic violence, dating violence, or stalking will not be construed as a serious or repeated violation of the lease by the victim or threatened victim of that violence and will not be used cause for terminating the tenancy or occupancy rights of the victim of such violence", and

(ii) in paragraph (6), by striking "; except that" and all that follows through "stalking; and"

(C) by striking subsection (u).

(2) Section 8—Section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f) is amended—

(A) in subsection (c), by striking paragraph (3);

(B) in subsection (d)(1)
S. 47—55

6) in subparagraph (A), by striking "and that an applicant or participant is or has been a victim of domestic violence, dating violence, or stalking is not an appropriate basis for denial of program assistance or for denial of admission if the applicant otherwise qualifies for assistance or admission"; and

(ii) in subparagraph (B)—

(D) in clause (ii), by striking ", and that an incident or incidents of actual or threatened domestic violence, dating violence, or stalking will not be construed as a serious or repeated violation of the lease by the victim or threatened victim of that violence and will not be good cause for terminating the tenancy or occupancy rights of the victim of such violence"; and

(ii) in clause (iii), by striking "except that" and all that follows through "stalking";

(C) in subsection (f)—

(i) in paragraph (6), by adding "and at the end; and"

(ii) in paragraph (7), by striking the semicolon at the end and inserting a period; and

(iii) by striking paragraphs (8), (9), (10), and (11); and

(D) in subsection (o)—

(i) in paragraph (6)(b), by striking the last sentences;

(ii) in paragraph (7)—

(I) in subparagraph (C), by striking "and that an incident or incidents of actual or threatened domestic violence, dating violence, or stalking shall not be construed as a serious or repeated violation of the lease by the victim or threatened victim of that violence and shall not be good cause for terminating the tenancy or occupancy rights of the victim of such violence"; and

(ii) in subparagraph (D), by striking "except that" and all that follows through "stalking"; and

(iii) by striking paragraph (20); and

(B) by striking subsection (ee).

(3) RULE OF CONSTRUCTION.—Nothing in this Act, or the amendments made by this Act, shall be construed—

(A) to limit the rights or remedies available to any person under section 6 or 8 of the United States Housing Act of 1937 (42 U.S.C. 1437d and 1437f), as in effect on the day before the date of enactment of this Act;

(B) to limit any right, remedy, or procedure otherwise available under any provision of part 5, 92, 493, 389, 808, 244, 250, 262, 309, 310, 312, 313, 315, 320, 325, 326, or 327 of title 24, Code of Federal Regulations, that

(C) was issued under the Violence Against Women and Department of Justice Reauthorization Act of 2005 (Public Law 109–162, 119 Stat. 2960) or an amendment made by that Act; and

(ii) provides greater protection for victims of domestic violence, dating violence, sexual assault, and stalking than this Act; or

(C) to disqualify an owner, manager, or other individual from participating in or receiving the benefits of the low
incense housing tax credit program under section 42 of the Internal Revenue Code of 1866 because of noncompliance with the provisions of this Act.

SEC. 692. TRANSITIONAL HOUSING ASSISTANCE GRANTS FOR VICTIMS OF DOMESTIC VIOLENCE, DATING VIOLENCE, SEXUAL ASSAULT, AND STALKING.

Chapter 13 of subtitle B of the Violence Against Women Act of 1994 (42 U.S.C. 13915 et seq.) is amended—

(1) in the chapter heading, by striking "CHILD VICTIMS OF DOMESTIC VIOLENCE, STALKING, OR SEXUAL ASSAULT" and inserting "VICTIMS OF DOMESTIC VIOLENCE, DATING VIOLENCE, SEXUAL ASSAULT, OR STALKING"; and

(2) in section 40220 (42 U.S.C. 13915)—

(A) in the heading, by striking "CHILD VICTIMS OF DOMESTIC VIOLENCE, STALKING, OR SEXUAL ASSAULT" and inserting "VICTIMS OF DOMESTIC VIOLENCE, DATING VIOLENCE, SEXUAL ASSAULT, OR STALKING";

(B) in subsection (a)(1), by striking "lifeline";

(C) in subsection (b)(3)—

(i) in subparagraph (A), by striking "end" at the end;

(ii) by redesignating subparagraph (B) as subparagraph (C);

(iii) by inserting after subparagraph (A) the following:

"(B) secure employment, including obtaining employment counseling, occupational training, job retention counseling, and counseling concerning re-entry into the workforce; and"

(iv) in subparagraph (C), as redesignated by clause (ii), by striking "employment counseling," and

(D) in subsection (g)—

(i) in paragraph (1), by striking "$40,000,000 for each of fiscal years 2007 through 2011" and inserting "$35,000,000 for each of fiscal years 2014 through 2018"; and

(ii) in paragraph (3)—

(I) in subparagraph (A), by striking "eligible" and inserting "qualified"; and

(II) by adding at the end the following:

"(C) QUALIFIED APPLICATION DEFINED.—In this paragraph, the term 'qualified application' means an application that—

(1) has been submitted by an eligible applicant;

(2) does not propose any activities that may compromise victim safety, including—

(1) background checks of victims; or

(3) clinical evaluations to determine eligibility for services;

(3) reflects an understanding of the dynamics of domestic violence, dating violence, sexual assault, or stalking; and

(4) does not propose prohibited activities, including mandatory services for victims."
SEC. 903. ADDRESSING THE HOUSING NEEDS OF VICTIMS OF DOMESTIC VIOLENCE, DATING VIOLENCE, SEXUAL ASSAULT, AND STALKING.

Subtitle N of the Violence Against Women Act of 1994 (42 U.S.C. 14043b et seq.) is amended—

(1) in section 4104(a) (42 U.S.C. 14043b-3(d)), by striking "$10,000,000 for each of fiscal years 2007 through 2011" and inserting "$4,000,000 for each of fiscal years 2014 through 2018"; and

(2) in section 4105(e) (42 U.S.C. 14043b-4(g)), by striking "$10,000,000 for each of fiscal years 2007 through 2011" and inserting "$4,000,000 for each of fiscal years 2014 through 2018".

TITLE VII—ECONOMIC SECURITY FOR VICTIMS OF VIOLENCE

SEC. 701. NATIONAL RESOURCE CENTER ON WORKPLACE RESPONSES TO ASSIST VICTIMS OF DOMESTIC AND SEXUAL VIOLENCE.

Section 4108(a)(c) of the Violence Against Women Act of 1994 (42 U.S.C. 14043b(e)) is amended by striking "fiscal years 2007 through 2011" and inserting "fiscal years 2014 through 2018".

TITLE VIII—PROTECTION OF BATTERED IMMIGRANTS

SEC. 801. U NONIMMIGRANT DEFINITION.


SEC. 802. ANNUAL REPORT ON IMMIGRATION APPLICATIONS MADE BY VICTIMS OF ABUSE.

Not later than December 1, 2014, and annually thereafter, the Secretary of Homeland Security shall submit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report that includes the following:

(1) The number of aliens who—

(A) submitted an application for nonimmigrant status under paragraph (10)(F), (10)(U)(1), or (6)(i) of section 101(a) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(10)(F), (11)(U), or (6)(i)) during the preceding fiscal year;

(B) were granted such nonimmigrant status during such fiscal year; and

(C) were denied such nonimmigrant status during such fiscal year.

(2) The mean amount of time and median amount of time to adjudicate an application for such nonimmigrant status during such fiscal year.

(3) The mean amount of time and median amount of time between the receipt of an application for such nonimmigrant status and the issuance of work authorization to an eligible applicant during the preceding fiscal year.
(4) The number of aliens granted continued presence in the United States under section 107(c)(3) of the Trafficking Victims Protection Act of 2000 (28 U.S.C. 7106(c)(3)) during the preceding fiscal year.

(5) A description of any actions being taken to reduce the adjudication and processing time, while ensuring the safe and competent processing, of an application described in paragraph (1) or a request for continued presence referred to in paragraph (4).

SEC. 853. PROTECTION FOR CHILDREN OF VAWA SELF-PETITIONERS.

Section 204(k)(2) of the Immigration and Nationality Act (8 U.S.C. 1154(k)(2)) is amended—

(1) in subparagraph (B), by striking "or" at the end;

(2) by redesignating subparagraph (F) as subparagraph (G); and

(3) by inserting after subparagraph (E) the following:

"(F) a child of an alien who filed a pending or approved petition for classification or application for adjustment of status or other benefit specified in section 101(a)(51) as a VAWA self-petitioner, or"

SEC. 854. PUBLIC CHARITY.

Section 213(a)(4) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(4)) is amended by adding at the end following:

"(B) SPECIAL RULE FOR QUALIFIED ALIEN VICTIMS.—

Subparagraphs (A), (B), and (C) shall not apply to an alien who—

"(i) is a VAWA self-petitioner;

"(ii) is an applicant for, or is granted, non- immigrant status under section 101(a)(15)(U); or

"(iii) is a qualified alien described in section 431(e) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (8 U.S.C. 1641(e))."

SEC. 855. REQUIREMENTS APPLICABLE TO U VISAS.

(a) In General.—Section 214(p) of the Immigration and Nationality Act (8 U.S.C. 1184(p)) is amended by adding at the end the following:

"(7) AGE DETERMINATIONS.—

"(A) CHILDREN.—An unmarried alien who seeks to accompany, or follow to join, a parent granted status under section 101(a)(15)(U), and who was under 21 years of age on the date on which such parent petitioned for such status, shall continue to be classified as a child for purposes of section 101(a)(15)(U)(ii), if the alien attains 21 years of age after such parent’s petition was filed but while it was pending.

"(B) PRINCIPAL ALIENS.—An alien described in clause (i) of section 101(a)(15)(U) shall continue to be treated as an alien described in clause (ii) of such section if the alien attains 21 years of age after the alien’s application for status under such clause (i) is filed but while it is pending."

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect as if enacted as part of the Victims of Trafficking and Violence Protection Act of 2000 (Public Law 106-386; 114 Stat. 1464).
SEC. 806. HARDSHIP WAIVERS.

(a) IN GENERAL.—Section 216(c)(4) of the Immigration and Nationality Act (8 U.S.C. 1186a(c)(4)) is amended—

(1) in subparagraph (A), by striking the comma at the end and inserting a semicolon;

(2) in subparagraph (B), by striking "(1), or" and inserting "(1),"; and

(3) in subparagraph (C), by striking the period at the end and inserting a semicolon and "or;" and

(4) by inserting after subparagraph (C) the following:

"(D) the alien meets the requirements under section 901(a)(1) or 901(b)(3)(A) and the marriage ceremony was battered by or subject to extreme cruelty perpetrated by the alien's intended spouse and was not at fault in failing to meet the requirements of paragraph (1)."

(b) TECHNICAL CORRECTIONS.—Section 216(c)(4) of the Immigration and Nationality Act (8 U.S.C. 1186a(c)(4)), as amended by subsection (a), is further amended—

(1) in the matter preceding subparagraph (A), by striking "The Attorney General, in the Attorney General's" and inserting "The Secretary of Homeland Security, in the Secretary's"; and

(2) in the undesignated paragraph at the end—

(A) in the first sentence, by striking "Attorney General" and inserting "Secretary of Homeland Security";

(B) in the second sentence, by striking "Attorney General" and inserting "Secretary";

(C) in the third sentence, by striking "Attorney General" and inserting "Secretary."; and

(D) in the fourth sentence, by striking "Attorney General" and inserting "Secretary".

SEC. 807. PROTECTIONS FOR A fiancéE OR fiancé OF A CITIZEN.

(a) IN GENERAL.—Section 214 of the Immigration and Nationality Act (8 U.S.C. 1184) is amended—

(1) in subsection (c)—

(A) in paragraph (1), by striking "crime," and inserting "crime described in paragraph (3)(B) and information on any permanent protection or restraining order issued against the petitioner related to any specified crime described in paragraph (3)(B),";

(B) in paragraph (5)(A), in the matter preceding clause (i)—

(i) by striking "a consular officer" and inserting "the Secretary of Homeland Security"; and

(ii) by striking "the officer" and inserting "the Secretary"; and

(C) in paragraph (3)(B)(i), by striking "abuse, and stalking," and inserting "abuse, stalking, or an attempt to commit any such crime,"; and

(2) in subsection (d)—

(A) in paragraph (1), by striking "crime," and inserting "crime described in paragraph (3)(B) and information on any permanent protection or restraining order issued against the petitioner related to any specified crime described in subsection (3)(B),"; and

(B) by amending paragraph (4)(B)(i) to read as follows:...
"(ii) To notify the beneficiary as required by clause (i), the Secretary of Homeland Security shall provide such notice to the Secretary of State for inclusion in the mailing to the beneficiary described in section 833(a)(O)(A) of the Immigration and Nationality Act of 2005 (8 U.S.C. 1375a(a)(5)(A)(2)) and (3) in paragraph (b)(2)(D)(i), by striking "abuse, stalking," and inserting "abuse, stalking, or an attempt to commit any such crimes.

(b) Provision of Information to Nonimmigrants—Section 833 of the Immigration and Nationality Act of 2005 (8 U.S.C. 1375a) is amended—

(1) in subsection (a)(2)(A)—

(A) in clause (ii)—

(i) by striking "State any" and inserting "State,

(ii) by striking the last sentence; and

(B) by adding at the end the following:

"(iv) The Secretary of Homeland Security shall conduct a background check of the National Crime Information Center's Protection Order Database on each petitioner for a visa under subsection (d) or (e) of section 214 of the Immigration and Nationality Act (8 U.S.C. 1184). Any appropriate information obtained from such background check—

"(I) shall accompany the criminal background information provided by the Secretary of Homeland Security to the Secretary of State and shared by the Secretary of State with a beneficiary of a petition referred to in clause (ii); and

"(II) shall not be used or disclosed for any other purpose unless expressly authorized by law.

"(v) The Secretary of Homeland Security shall create a cover sheet or other mechanism to accompany the information required to be provided to an applicant for a visa under subsection (d) or (e) of section 214 of the Immigration and Nationality Act (8 U.S.C. 1184) by clauses (i) through (iv) of this paragraph or by clauses (i) and (ii) of subsection (a)(4)(B) of such section 214, that calls to the applicant's attention—

"(1) whether the petitioner disclosed a protection order, a restraining order, or criminal history information on the visa petition;

"(II) the criminal background information and information about any protection order obtained by the Secretary of Homeland Security regarding the petitioner in the course of adjudicating the petition; and

"(III) whether the information the petitioner disclosed on the visa petition regarding any previous petitions filed under subsection (d) or (e) of such section 214 is consistent with the information in the multiple visa tracking database of the Department of Homeland Security, as described in subsection (b)(1)(A) of such section 214,"; and

(2) in subsection (b)(1)(A), by striking "or" after "orders" and inserting "and".
S. 47—61

SEC. 806. REGULATION OF INTERNATIONAL MARRIAGE BROKERS.

(a) IMPLEMENTATION OF THE INTERNATIONAL MARRIAGE BROKER ACT OF 2005.—

(1) FINDINGS.—Congress finds the following:

(A) The International Marriage Broker Act of 2005 (subtitle D of Public Law 108–182; 118 Stat. 2038) has not been fully implemented with respect to investigating and prosecuting violations of the law, and for other purposes.

(B) Six years after Congress enacted the International Marriage Broker Act of 2005 to regulate the activities of the hundreds of for-profit international marriage brokers operating in the United States, the Attorney General has not determined which component of the Department of Justice will investigate and prosecute violations of such Act.

(2) REPORT.—Not later than 90 days after the date of enactment of this Act, the Attorney General shall submit to Congress a report that includes the following:

(A) The names of the components of the Department of Justice responsible for investigating and prosecuting violations of the International Marriage Broker Act of 2005 (subtitle D of Public Law 108–182; 118 Stat. 2038) and the amendments made by this Act.

(B) A description of the policies and procedures of the Attorney General for consultation with the Secretary of Homeland Security and the Secretary of State in investigating and prosecuting such violations.

(b) TECHNICAL CORRECTION.—Section 838(a)(3)(D) of the International Marriage Broker Regulation Act of 2006 (8 U.S.C. 1377(a)(3)(D)) is amended by striking "Federal and State sex offender public registries" and inserting "the National Sex Offender Public Website".

(c) REGULATION OF INTERNATIONAL MARRIAGE BROKERS.—Section 838(d) of the International Marriage Broker Regulation Act of 2006 (8 U.S.C. 1377(d)) is amended—

(1) by amending paragraph (1) to read as follows:

"(1) PROHIBITION ON MARKETING OF OR TO CHILDREN.—

(A) IN GENERAL.—An international marriage broker shall not provide any individual or entity with the personal contact information, photograph, or general information about the background or interests of any individual under the age of 18.

(B) COMPLIANCE.—To comply with the requirements of subparagraph (A), an international marriage broker shall—

(i) obtain a valid copy of each foreign national client’s birth certificate or other proof of age document issued by an appropriate government entity;

(ii) indicate on such certificate or document the date it was received by the international marriage broker;

(iii) retain the original of such certificate or document for 7 years after such date of receipt; and

(iv) produce such certificate or document upon request to an appropriate authority charged with the enforcement of this paragraph.;"
S. 47—62

(2) in paragraph (2)—

(A) in subparagraph (A)(i)—

(i) by striking "registries.—" and inserting "warrants.—"; and

(ii) by striking "Registry or State sex offender public registry," and inserting "Website:"; and

(B) in subparagraph (B)(ii), by striking "or stalking," and inserting "or an attempt to commit any such crime.");

(3) in paragraph (3)—

(A) in subparagraph (A)—

(i) in clause (i), by striking "Registry, or of the relevant State sex offender public registry for any State not yet participating in the National Sex Offender Public Registry, in which the United States claims has resided during the previous 20 years," and inserting "Website:"; and

(ii) in clause (iii)(II), by striking "background information collected by the international marriage broker under paragraph (2)(E)" and inserting "sipped certification and accompanying documentation or attestation regarding the background information collected under paragraph (2)(E)"; and

(B) by striking subparagraph (C);

(4) in paragraph (5)—

(A) in subparagraph (A)(ii), by striking "a penalty may be imposed under clause (i) by the Attorney General only" and inserting "At the discretion of the Attorney General, a penalty may be imposed under clause (i) either by a Federal judge, or by the Attorney General.";

(B) by amending subparagraph (B) to read as follows:

"(B) FEDERAL CRIMINAL PENALTIES.

"(a) PENALTIES ON INTENTIONALLY VIOLATING OBLIGATIONS.—Except as provided in clause (ii), an international marriage broker that, in circumstances in which a Federal judge, or the Attorney General, has required the broker to comply with obligations, willfully violates a requirement under paragraph (2), (3), (4), or (5) shall be fined in accordance with title 18, United States Code, or imprisoned for not more than 1 year, or both; or

"(i) knowing or attempting to violate any requirements under paragraphs (2), (3), or (4) shall be fined in accordance with title 18, United States Code, or imprisoned for not more than 5 years, or both; or

"(ii) knowing or attempting to violate any requirements under paragraphs (2), (3), (4), or (5) shall be fined in accordance with title 18, United States Code, or imprisoned for not more than 1 year, or both.

"(b) PENALTIES ON KNOWINGLY DISCLOSING INFORMATION.—A person who knowingly discloses, uses, or causes to be used any information obtained by an international marriage broker as a result of a requirement under paragraph (2) or (3) for any purpose other than the disclosures required under paragraph (2) or (3) shall be fined in accordance with title 18, United States Code, or imprisoned for not more than 1 year, or both.

"(c) PENALTIES ON KNOWINGLY FAILING TO MAKE REQUIRED SELF-DISCLOSURES.—A person

"(d) PENALTIES ON KNOWINGLY FAILING TO MAKE REQUIRED SELF-DISCLOSURES. —A person

"(e) PENALTIES ON KNOWINGLY FAILING TO MAKE REQUIRED SELF-DISCLOSURES. —A person

"(f) PENALTIES ON KNOWINGLY FAILING TO MAKE REQUIRED SELF-DISCLOSURES. —A person

"(g) PENALTIES ON KNOWINGLY FAILING TO MAKE REQUIRED SELF-DISCLOSURES. —A person

"(h) PENALTIES ON KNOWINGLY FAILING TO MAKE REQUIRED SELF-DISCLOSURES. —A person

"(i) PENALTIES ON KNOWINGLY FAILING TO MAKE REQUIRED SELF-DISCLOSURES. —A person

"(j) PENALTIES ON KNOWINGLY FAILING TO MAKE REQUIRED SELF-DISCLOSURES. —A person

"(k) PENALTIES ON KNOWINGLY FAILING TO MAKE REQUIRED SELF-DISCLOSURES. —A person

"(l) PENALTIES ON KNOWINGLY FAILING TO MAKE REQUIRED SELF-DISCLOSURES. —A person

"(m) PENALTIES ON KNOWINGLY FAILING TO MAKE REQUIRED SELF-DISCLOSURES. —A person

"(n) PENALTIES ON KNOWINGLY FAILING TO MAKE REQUIRED SELF-DISCLOSURES. —A person

"(o) PENALTIES ON KNOWINGLY FAILING TO MAKE REQUIRED SELF-DISCLOSURES. —A person

"(p) PENALTIES ON KNOWINGLY FAILING TO MAKE REQUIRED SELF-DISCLOSURES. —A person
who knowingly and with intent to defraud another person outside the United States in order to recruit, solicit, entice, or induce that other person into entering a dating or matrimonial relationship, makes false or fraudulent representations regarding the disclosures described in clauses (i), (ii), (iii), and (iv) of subsection (d)(2)(B), including by failing to make any such disclosure, shall be fined in accordance with title 18, United States Code, imprisoned for not more than 1 year, or both.

(ii) RELATIONSHIP TO OTHER PENALTIES.—The penalties provided in clauses (i), (ii), and (iii) are in addition to any other civil or criminal liability under Federal or State law to which a person may be subject for the misuse of information, including misuse to threaten, intimidate, or harass any individual.

(iii) CONSTRUCTION.—Nothing in this paragraph or paragraph (3) or (4) may be construed to prevent the disclosure of information to law enforcement or pursuant to a court order; and

(iv) in subparagraph (c), by striking the period at the end and inserting "including equitable remedies.");

(v) by redesignating paragraphs (6) and (7) as paragraphs (7) and (8), respectively; and

(vi) by inserting after paragraph (5) the following:

"(6) ENFORCEMENT.—

(A) AUTHORITY.—The Attorney General shall be responsible for the enforcement of the provisions of this section, including the prosecution of civil and criminal penalties provided for by this section.

(B) CONSULTATION.—The Attorney General shall consult with the Director of the Office on Violence Against Women of the Department of Justice to develop policies and public education designed to promote enforcement of this section.

(C) GAO STUDY AND REPORT.—Section 833(f) of the International Marriage Broker Regulation Act of 2005 (8 U.S.C. 1360a(f)) is amended—

(1) in the subsection heading, by striking "STUDY AND REPORT." and inserting "STUDIES AND REPORTS."); and

(2) by adding at the end the following:

(4) CONTINUING IMPACT STUDY AND REPORT.—

(A) STUDY.—The Comptroller General shall conduct a study on the continuing impact of the implementation of this section and of section of 214 of the Immigration and Nationality Act (8 U.S.C. 1184) on the process for granting nonimmigrant visas, including specifically a study of the items described in subparagraphs (A) through (B) of paragraph (1).

(B) REPORT.—Not later than 2 years after the date of the enactment of the Violence Against Women Reauthor-

(ization Act of 2013, the Comptroller General shall submit to the Committees on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report setting forth the results of the study conducted under subparagraph (A).
S. 47—64

"(C) DATA COLLECTION.—The Attorney General, the
Secretary of Homeland Security, and the Secretary of State
shall collect and maintain the data necessary for the Com-
troller General to conduct the study required by paragraph
(1)(A)."

SEC. 609. ELIGIBILITY OF CRIME AND TRAFFICKING VICTIMS IN THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
TO ADJUST STATUS.

Section 701(c) of the Consolidated Natural Resources Act of
2008 (Public Law 110–229; 48 U.S.C. 1675 note), as amended by
striking "except that," and all that follows through the end, and
inserting the following: "except that—

"(1) for the purpose of determining whether an alien law-
fully admitted for permanent residence (as defined in section
101(a)(20) of the Immigration and Nationality Act (8 U.S.C.
1101(a)(20)) has abandoned or lost such status by reason of
absence from the United States, such alien's presence in the
Commonwealth, before, on or after November 28, 2009, shall
be considered to be present in the United States; and

"(2) for the purpose of determining whether an alien whose
application for status under subparagraph (B) or (C) of section
101(a)(15) of the Immigration and Nationality Act (8 U.S.C.
1101(a)(15)) was granted is subsequently eligible for adjustment
under subsection (i) or (m) of section 245 of such Act (8 U.S.C.
1255), such alien's physical presence in the Commonwealth
before, on, or after November 28, 2009, and subsequent to
the grant of the application, shall be considered as equivalent
to presence in the United States pursuant to a nonimmigrant
admission in such status."

SEC. 614. DISCLOSURE OF INFORMATION FOR NATIONAL SECURITY
PURPOSES.

(a) INFORMATION SHARING.—Section 384(b) of the Illegal
Immigration Reform and Immigrant Responsibility Act of 1996
(8 U.S.C. 1327(b)) is amended—

(1) in paragraph (1)—
(A) by inserting "Secretary of Homeland Security or the"
before "Attorney General may"; and
(B) by inserting "Secretary's or the" before "Attorney
General's discretion";
(2) in paragraph (2)—
(A) by inserting "Secretary of Homeland Security or the"
before "Attorney (generally may"
(B) by inserting "Secretary or the" before "Attorney
General for"; and
(C) by inserting "in a manner that protects the con-
fidentiality of such information" after "law enforcement
purpose";
(3) in paragraph (5), by striking "Attorney General is" and
inserting "Secretary of Homeland Security and the Attorney
General are"; and
(4) by adding at the end a new paragraph as follows:
"(6) Notwithstanding subsection (a)(2), the Secretary of
Homeland Security, the Secretary of State, or the Attorney
General may provide in the discretion of either such Secretary
or the Attorney General for the disclosure of information to
national security officials to be used solely for a national security purpose in a manner that protects the confidentiality of such information.

(b) GUIDELINES.—Section 384(d) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1367(d)) is amended—

(1) by inserting "Secretary of State," after "The Attorney General";

(2) by inserting "Department of State," after "Department of Justice"; and

(3) by inserting "any forms of trafficking in persons or criminal activity listed in section 101(a)(15)(D) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(D)) after "domestic violence".

(c) IMPLEMENTATION.—Not later than 180 days after the date of the enactment of this Act, the Attorney General, the Secretary of State, and Secretary of Homeland Security shall provide the guidance required by section 384(d) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1367(d)), consistent with the amendments made by subsections (a) and (b).

(d) CLERICAL AMENDMENT.—Section 384(a)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 is amended by striking "384(a)(1)" in the matter following subparagraph (P) and inserting "384(a)(3)".

TITLE IX—SAFETY FOR INDIAN WOMEN

SEC. 901. GRANTS TO INDIAN TRIBAL GOVERNMENTS.

Section 2015(a) of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (26 U.S.C. 3786gg–10(a)) is amended—

(1) in paragraph (3), by inserting "sex trafficking," after "sexual assault;"

(2) in paragraph (4), by inserting "sex trafficking," after "sexual assault;"

(3) in paragraph (5), by striking "and stalking" and all that follows and inserting "sexual assault, sex trafficking, and stalking;"

(4) in paragraph (7)—

(A) by inserting "sex trafficking," after "sexual assault," each place it appears; and

(B) by striking "and" at the end;

(5) in paragraph (8)—

(A) by inserting "sex trafficking," after "stalking;" and

(B) by striking the period at the end and inserting a semicolon; and

(6) by adding at the end the following:

"(10) develop and promote legislation and policies that enhance best practices for responding to violent crimes against Indian women, including the crimes of domestic violence, dating violence, sexual assault, sex trafficking, and stalking."
SEC. 993. GRANTS TO INDIAN TRIBAL COALITIONS.

Section 2001 of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3795gg) is amended by striking subsection (d) and inserting the following:

"(d) TRIBAL COALITION GRANTS—

"(1) PURPOSE.—The Attorney General shall award a grant to tribal coalitions for purposes of—

"(A) increasing awareness of domestic violence and sexual assault against Indian women;

"(B) enhancing the response to violence against Indian women at the Federal, State, and tribal levels;

"(C) identifying and providing technical assistance to coalition membership and tribal communities to enhance access to essential services to Indian women victimized by domestic and sexual violence, including sex trafficking; and

"(D) assisting Indian tribes in developing and promoting State, local, and tribal legislation and policies that enhance best practices for responding to violent crimes against Indian women, including the crimes of domestic violence, dating violence, sexual assault, sex trafficking, and stalking.

"(2) GRANTS.—The Attorney General shall award grants on an annual basis under paragraph (1) to—

"(A) each tribal coalition that—

"(i) meets the criteria of a tribal coalition under section 40002(a) of the Violence Against Women Act of 1994 (42 U.S.C. 13925(a));

"(ii) is recognized by the Office on Violence Against Women; and

"(iii) provides services to Indian tribes; and

"(B) organizations that propose to incorporate and operate a tribal coalition in areas where Indian tribes are located but no tribal coalition exists.

"(3) USE OF AMOUNTS.—For each of fiscal years 2014 through 2018, of the amounts appropriated to carry out this subsection—

"(A) not more than 10 percent shall be made available to organizations described in paragraph (2)(A), provided that 1 or more organizations determined by the Attorney General to be qualified apply;

"(B) not less than 90 percent shall be made available to tribal coalitions described in paragraph (2)(A), which amounts shall be distributed equally among each eligible tribal coalition for the applicable fiscal year.

"(4) ELIGIBILITY FOR OTHER GRANTS.—Receipt of an award under this subsection by a tribal coalition shall not preclude the tribal coalition from receiving additional grants under this title to carry out the purposes described in paragraph (1).

"(5) MULTIPLE PURPOSE APPLICATIONS.—Nothing in this subsection prohibits any tribal coalition or organization described in paragraph (2) from applying for funding to address sexual assault or domestic violence needs in the same application."
SEC. 303. CONSENTATION.

Section 903 of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (42 U.S.C. 14045d) is amended—

(1) in subsection (a)—
   (A) by striking "and the Violence Against Women Act of 2000" and inserting "the Violence Against Women Act of 2000"; and
   (B) by inserting "; and the Violence Against Women Reauthorization Act of 2013" before the period at the end;

(2) in subsection (b)—
   (A) in the matter preceding paragraph (1), by striking "Secretary of the Department of Health and Human Services" and inserting "Secretary of Health and Human Services, the Secretary of the Interior;"; and
   (B) in paragraph (2), by striking "and stalking" and inserting "stalking, and sex trafficking;" and

(c) ANNUAL REPORT.—The Attorney General shall submit to Congress an annual report on the annual consultations required under subsection (a) that—
   (1) contains the recommendations made under subsection (b) by Indian tribes during the year covered by the report;
   (2) describes actions taken during the year covered by the report to respond to recommendations made under subsection (b) during the year or a previous year; and
   (3) describes how the Attorney General will work in coordination and collaboration with Indian tribes, the Secretary of Health and Human Services, and the Secretary of the Interior to address the recommendations made under subsection (b).

SEC. 304. JURISDICTION OVER CRIMES OF DOMESTIC VIOLENCE.

Title II of Public Law 90–284 (28 U.S.C. 1201 et seq.) (commonly known as the "Indian Civil Rights Act of 1968") is amended by adding at the end the following:

"SEC. 304. JURISDICTION OVER CRIMES OF DOMESTIC VIOLENCE.

"(a) DEFINITIONS.—In this section:
   (1) DATING VIOLENCE.—The term ‘dating violence’ means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency and nature of interaction between the persons involved in the relationship.
   (2) DOMESTIC VIOLENCE.—The term ‘domestic violence’ means violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic or family violence
laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs.

(3) INDIAN COUNTRY.—The term 'Indian country' has the meaning given in the term in section 1151 of title 18, United States Code.

(4) PARTICIPATING TRIBE.—The term 'participating tribe' means an Indian tribe that elects to exercise special domestic violence criminal jurisdiction over the Indian country of that Indian tribe.

(5) PROTECTION ORDER.—The term 'protection order'

(A) means any injunction, restraining order, or other order issued by a civil or criminal court for the purpose of preventing violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person; and

(B) includes any temporary or final order issued by a civil or criminal court, whether obtained by filing an independent action or as a pendente lite order in another proceeding, if the civil or criminal order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.

(6) SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION.—The term 'special domestic violence criminal jurisdiction' means the criminal jurisdiction that a participating tribe may exercise under this section but could not otherwise exercise.

(7) SPOUSE OR INTIMATE PARTNER.—The term 'spouse or intimate partner' has the meaning given the term in section 226b of title 18, United States Code.

(8) NATURE OF THE CRIMINAL JURISDICTION.—

(1) IN GENERAL.—Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed by sections 201 and 283, the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.

(2) CONCURRENT JURISDICTION.—The exercise of special domestic violence criminal jurisdiction by a participating tribe shall be concurrent with the jurisdiction of the United States, of a State, or of both.

(3) APPLICABILITY.—Nothing in this section—

(A) creates or eliminates any Federal or State criminal jurisdiction over Indian country; or

(B) affects the authority of the United States or any State government that has been delegated authority by the United States to investigate and prosecute a criminal violation in Indian country.

(4) EXCEPTIONS—

(A) VICTIM AND DEFENDANT ARE BOTH NON-INDIANS.—

(i) IN GENERAL.—A participating tribe may not exercise special domestic violence criminal jurisdiction over an alleged offense if neither the defendant nor the alleged victim is an Indian.

(ii) DEFINITION OF VICTIM.—In this subparagraph and with respect to a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction based on a violation of a protection
S. 47-69

order, the term 'victim' means a person specifically protected by a protection order that the defendant allegedly violated.

(b) DEFENDANT HAS TIES TO THE INDIAN COUNTRY.

A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant only if the defendant:

(i) resides in the Indian country of the participating tribe;

(ii) is employed in the Indian country of the participating tribe; or

(iii) is a spouse, intimate partner, or dating partner of—

(A) a member of the participating tribe; or

(B) an Indian who resides in the Indian country of the participating tribe.

(c) CRIMINAL CONDUCT. A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant for criminal conduct that falls into one or more of the following categories:

1. DOMESTIC VIOLENCE AND DATING VIOLENCE. An act of domestic violence or dating violence that occurs in the Indian country of the participating tribe.

2. VIOLATIONS OF PROTECTION ORDERS. An act that—

(A) occurs in the Indian country of the participating tribe; and

(B) violates the portion of a protection order that—

(i) prohibits or provides protection against violence or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;

(ii) was issued against the defendant;

(iii) is enforceable by the participating tribe; and

(iv) is consistent with section 2565(b) of title 18, United States Code.

(d) RIGHTS OF DEFENDANTS. In a criminal proceeding in which a participating tribe exercises special domestic violence criminal jurisdiction, the participating tribe shall provide to the defendant—

1. All applicable rights under this Act.

2. If a term of imprisonment of any length may be imposed, all rights described in section 2252(c).

3. The right to a trial by an impartial jury that is drawn from sources that—

(A) reflect a fair cross section of the community; and

(B) do not systematically exclude any distinctive group in the community, including non-Indians; and

4. All other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating tribe to exercise special domestic violence criminal jurisdiction over the defendant.

(e) PROHIBITIONS TO STAY DETENTION.

(1) IN GENERAL. A person who has filed a petition for a writ of habeas corpus in a court of the United States under section 2241 may petition that court to stay further detention of that person by the participating tribe.
"(c) Grant of stay.—A court shall grant a stay described in paragraph (1) if the court—

(A) finds that there is a substantial likelihood that the habeas corpus petition will be granted; and

(B) after giving each alleged victim in the matter an opportunity to be heard, finds by clear and convincing evidence that under conditions imposed by the court, the petitioner is not likely to flee or pose a danger to any person or the community if released.

(c) NOTICE.—An Indian tribe that has ordered the detention of any person has a duty to timely notify such person of his rights and privileges under this subsection and under section 203.

(d) GRANTS TO TRIBAL GOVERNMENTS.—The Attorney General may award grants to the governments of Indian tribes (or to authorized designees of those governments)—

(I) to strengthen tribal criminal justice systems to assist Indian tribes in exercising special domestic violence criminal jurisdiction, including—

(A) law enforcement (including the capacity of law enforcement or court personnel to enter information into and obtain information from national crime information databases);

(B) prosecution;

(C) trial and appellate courts;

(D) probation systems;

(E) detention and correctional facilities;

(F) alternative rehabilitation centers;

(G) culturally appropriate services and assistance for victims and their families; and

(H) criminal codes and rules of criminal procedure, appellate procedure, and evidence;

(II) to provide indigent criminal defendants with the effective assistance of licensed defense counsel, at no cost to the defendant, in criminal proceedings in which a participating tribe prosecutes a crime of domestic violence or dating violence or a criminal violation of a protection order;

(i) to ensure that, in criminal proceedings in which a participating tribe exercises special domestic violence criminal jurisdiction, juries are summoned, selected, and instructed in a manner consistent with all applicable requirements; and

(ii) to accord victims of domestic violence, dating violence, and violations of protection orders rights that are similar to the rights of a crime victim described in section 3771(a) of title 18, United States Code, consistent with tribal law and custom.

(e) SUPPLEMENT, NOT SUBSTITUTION.—Amounts made available under this section shall supplement and not supplant any other Federal, State, tribal, or local government amounts made available to carry out activities described in this section.

(f) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated $5,000,000 for each of fiscal years 2014 through 2018 to carry out subsection (f) and to provide training, technical assistance, data collection, and evaluation of the criminal justice systems of participating tribes."
SEC. 956. TRIBAL PROTECTION ORDERS.

Section 2265 of title 18, United States Code, is amended by striking subsection (e) and inserting the following:

"(e) TRIBAL COURT JURISDICTION.—For purposes of this section, a court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 2261) or otherwise within the authority of the Indian tribe."

SEC. 956. AMENDMENTS TO THE FEDERAL ASSAULT STATUTE.

(a) IN GENERAL.—Section 113 of title 18, United States Code, is amended—

(1) in subsection (a)—

(A) by striking paragraph (1) and inserting the following:

"1. Assault with intent to commit murder or a violation of section 2241 or 2243, by a fine under this title, imprisonment for not more than 30 years, or both.";

(B) in paragraph (2), by striking "felony under chapter 100A" and inserting "violation of section 2241 or 2243";

(C) in paragraph (3) by striking "and without just cause or excuse"; and

(D) in paragraph (4), by striking "six months" and inserting "1 year";

(E) in paragraph (7)—

(i) by striking "substantial bodily injury to an individual who has not attained the age of 18 years" and inserting "substantial bodily injury to a spouse or intimate partner, a dating partner, or an individual who has not attained the age of 18 years"; and

(ii) by striking "fine" and inserting "a fine"; and

(F) by adding at the end the following:

"(8) Assault of a spouse, intimate partner, or dating partner by strangling, suffocating, or attempting to strangle or suffocate, by a fine under this title, imprisonment for not more than 10 years, or both."; and

(2) in subsection (b)—

(A) by striking "(b) As used in this subsection—" and inserting the following:

"(b) DEFINITIONS.—In this section—"

(i) in paragraph (1)(B), by striking "and" at the end;

(ii) in paragraph (2), by striking the period at the end and inserting a semicolon; and

(iii) by adding at the end the following:

"(3) the terms ‘dating partner’ and ‘spouse or intimate partner’ have the meanings given those terms in section 2266;

(4) the term ‘strangling’ means intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of a person by applying pressure to the throat or neck, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or profoundly injure the victim; and

(5) the term ‘suffocating’ means intentionally, knowingly, or recklessly impeding the normal breathing of a person by
covering the mouth of the person, the nose of the person, or both, regardless of whether that conduct results in any visible injury or whether there is any intent to kill or prostrately injure the victim.

(b) INDIAN MAJOR CRIMES.—Section 1153(a) of title 18, United States Code, is amended by striking "assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title)" and inserting "a felony assault under section 1153.

(c) REPEAT OFFENDERS.—Section 2265A(b)(1)(B) of title 18, United States Code, is amended by inserting "or tribal" after "State".

SEC. 907. ANALYSIS AND RESEARCH ON VIOLENCE AGAINST INDIAN WOMEN.

(a) IN GENERAL.—Section 904(a) of the Violence Against Women and Department of Justice Reauthorization Act of 2008 (42 U.S.C. 3796gg–10 note) is amended—

(1) in paragraph (1)—

(A) by striking "The National" and inserting "Not later than 3 years after the date of enactment of the Violence Against Women Reauthorization Act of 2013, the National"; and

(B) by inserting "and in Native villages (as defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602))" before the period at the end;

(2) in paragraph (2)(A)—

(A) in clause (vi), by striking "and" at the end;

(B) in clause (v), by striking the period at the end and inserting "; and"; and

(C) by adding at the end the following:

"(vii) sex trafficking;"

(3) in paragraph (4), by striking "this Act" and inserting "the Violence Against Women Reauthorization Act of 2013"; and

(4) in paragraph (5), by striking "this section $1,000,000 for each of fiscal years 2007 and 2008" and inserting "this subsection $1,000,000 for each of fiscal years 2014 and 2015."

(b) AUTHORIZATION OF APPROPRIATIONS.—Section 909(b)(2) of the Violence Against Women and Department of Justice Reauthorization Act of 2008 (42 U.S.C. 584 note) is amended by striking "fiscal years 2007 through 2011" and inserting "fiscal years 2014 through 2016."

SEC. 908. EFFECTIVE DATES; PILOT PROJECT.

(a) GENERAL EFFECTIVE DATE.—Except as provided in section 4 and subsection (b) of this section, the amendments made by this title shall take effect on the date of enactment of this Act.

(b) EFFECTIVE DATE FOR SPECIAL DOMESTIC-VIOLENCE CRIMINAL JURISDICTION.—

(1) IN GENERAL.—Except as provided in paragraph (2), sub-

section (k) through (l) of section 204 of Public Law 90–264 (as added by section 904) shall take effect on the date that is 2 years after the date of enactment of this Act.

(2) PILOT PROJECT.—

(A) IN GENERAL.—At any time during the 2-year period beginning on the date of enactment of this Act, an Indian tribe may ask the Attorney General to designate the tribe
as a participating tribe under section 204(a) of Public Law 90-284 on an accelerated basis.

(B) PROCEDURE.—The Attorney General may grant a request under subparagraph (A) after coordinating with the Secretary of the Interior, consulting with affected Indian tribes, and concluding that the criminal justice system of the requesting tribe has adequate safeguards in place to protect defendants’ rights, consistent with section 204 of Public Law 90-284.

(C) EFFECTIVE DATES FOR PILOT PROJECTS.—An Indian tribe designated as a participating tribe under this paragraph may commence exercising special domestic violence criminal jurisdiction pursuant to subsection (b) through (d) of section 204 of Public Law 90-284 on a date established by the Attorney General, after consultation with that Indian tribe, but in no event later than the date that is 2 years after the date of enactment of this Act.

SEC. 903. INDIAN LAW AND ORDER COMMISSION REPORT ON THE ALASKA RURAL JUSTICE AND LAW ENFORCEMENT COMMISSION.

(a) IN GENERAL.—Section 15(1) of the Indian Law Enforcement Reform Act (25 U.S.C. 2812(f)) is amended by striking "2 years" and inserting "3 years".

(b) REPORT.—The Attorney General, in consultation with the Attorney General of the State of Alaska, the Commissioner of Public Safety of the State of Alaska, the Alaska Federation of Natives and Federally recognized Indian tribes in the State of Alaska, shall report to Congress not later than one year after enactment of this Act with respect to whether the Alaska Rural Justice and Law Enforcement Commission established under Section 115(a)(3) of the Consolidated Appropriations Act, 2004 should be continued and appropriations authorized for the continued work of the commission. The report may contain recommendations for legislation with respect to the scope of work and composition of the commission.

SEC. 910. SPECIAL RULE FOR THE STATE OF ALASKA.

(a) EXPANDED JURISDICTION.—In the State of Alaska, the amendments made by sections 904 and 905 shall only apply to the Indian country (as defined in section 1151 of title 18, United States Code) of the Metlakatla Indian Community, Annette Island Reserve.

(b) RETAINED JURISDICTION.—The jurisdiction and authority of each Indian tribe in the State of Alaska under section 2595(e) of title 18, United States Code (as in effect on the day before the date of enactment of this Act)—

(1) shall remain in full force and effect; and

(2) are not limited or diminished by this Act or any amendment made by this Act.

(c) SAVING PROVISION.—Nothing in this Act or an amendment made by this Act limits or diminishes the jurisdiction of the State of Alaska, any subdivision of the State of Alaska, or any Indian tribe in the State of Alaska.
TITLE X—SAFER ACT

SEC. 1001. SHORT TITLE.
This title may be cited as the "Sexual Assault Forensic Evidence Reporting Act of 2013" or the "SAFER Act of 2013".

SEC. 1002. DEMBE SMITH GRANTS FOR AUDITING SEXUAL ASSAULT EVIDENCE BACKLOGS.

Section 2 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14335) is amended—

(1) in subsection (a), by adding at the end the following new paragraph:

"(7) To conduct an audit consistent with subsection (a) of the samples of sexual assault evidence that are in the possession of the State or unit of local government and are awaiting testing;

(8) To ensure that the collection and processing of DNA evidence by law enforcement agencies from crimes, including sexual assault and other violent crimes against persons, is carried out in an appropriate and timely manner and in accordance with the protocols and practices developed under subsection (a)(3);"

(2) in subsection (c), by adding at the end the following new paragraph:

"(4) ALLOCATION OF GRANT AWARDS FOR AUDITS.—For each of fiscal years 2014 through 2017, not less than 5 percent, but not more than 7 percent, of the grant amounts distributed under paragraph (1) shall, if sufficient applications to justify such amounts are received by the Attorney General, be awarded for purposes described in subsection (a)(7), provided that none of the funds required to be distributed under this paragraph shall decrease or otherwise limit the availability of funds required to be awarded to States or units of local government under paragraph (3); and

(3) by adding at the end the following new subsections:

"(n) USE OF FUNDS FOR AUDITING SEXUAL ASSAULT EVIDENCE BACKLOGS.—

(1) ELIGIBILITY.—The Attorney General may award a grant under this section to a State or unit of local government for the purpose described in subsection (a)(7) only if the State or unit of local government—

(A) submits a plan for performing the audit of samples described in such subsection; and

(B) includes in such plan a good-faith estimate of the number of such samples;

(2) GRANT CONDITIONS.—A State or unit of local government receiving a grant for the purpose described in subsection (a)(7)—

(A) may not enter into any contract or agreement with any non-governmental vendor laboratory to conduct an audit described in subsection (a)(7); and

(B) shall—

(i) not later than 1 year after receiving the grant, complete the audit referred to in paragraph (1)(A) in accordance with the plan submitted under such paragraph;"
not later than 60 days after receiving possession of a sample of sexual assault evidence that was
not in the possession of the State or unit of local government at the time of the initiation of an audit
under paragraph (1)(A), subject to paragraph (4)(F), include in any required reports under clause (v), the
information listed under paragraph (4)(D);

(ii) for each sample of sexual assault evidence that is identified as awaiting testing as part of the
audit referred to in paragraph (1)(A)—

(I) assign a unique numeric or alphanumeric
identifier to each sample of sexual assault evidence
that is in the possession of the State or unit of
local government and is awaiting testing; and

(ii) identify the date or dates after which
the State or unit of local government would be
barred by any applicable statutes of limitations
from prosecuting a perpetrator of the sexual
assault to which the sample relates;

(vi) provide that—

(I) the chief law enforcement officer of the
State or unit of local government, respectively,
is the individual responsible for the compliance
of the State or unit of local government, respec-
tively, with the reporting requirements described
in clause (v); or

(ii) the designated officer may fulfill
the responsibility described in subclause (I) as long
as such designation is an employee of the State or
unit of local government, respectively, and is not
an employee of any governmental laboratory or
non-governmental vendor laboratory; and

(v) comply with all greater reporting require-
ments described in paragraph (4).

(3) Extension of initial deadline.—The Attorney
General may grant an extension of the deadline under paragraph
(2)(B)(i) to a State or unit of local government that demon-
strates that more time is required for compliance with such
paragraph.

(4) Sexual assault forensic evidence reports.—

(A) In general.—For not less than 12 months after
the completion of an initial count of sexual assault evidence
that is awaiting testing during an audit referred to in
paragraph (1)(A), a State or unit of local government that
receives a grant award under subsection (a)(7) shall, not
less than every 60 days, submit a report to the Department
of Justice, on a form prescribed by the Attorney General,
which shall contain the information required under
subparagraphs (B).

(B) Contents of reports.—A report under this para-
graph shall contain the following information:

(i) The name of the State or unit of local govern-
ment filing the report.

(ii) The period of time covered by the report.

(iii) The cumulative total number of samples of
sexual assault evidence that, at the end of the reporting
period—
S. 47—76

"(I) are in the possession of the State or unit of local government at the reporting period;

"(II) are awaiting testing; and

"(III) the State or unit of local government has determined should undergo DNA or other appropriate forensic analyses.

"(iv) The cumulative total number of samples of sexual assault evidence in the possession of the State or unit of local government that, at the end of the reporting period, the State or unit of local government has determined should not undergo DNA or other appropriate forensic analyses, provided that the reporting form shall allow for the State or unit of local government, at its sole discretion, to explain the reasoning for this determination in some or all cases.

"(v) The cumulative total number of samples of sexual assault evidence in a total under clause (iii) that have been submitted to a laboratory for DNA or other appropriate forensic analyses.

"(vi) The cumulative total number of samples of sexual assault evidence identified by an audit referred to in paragraph (1)(A) or under paragraph (2)(B)(iii) for which DNA or other appropriate forensic analysis has been completed at the end of the reporting period.

"(vii) The total number of samples of sexual assault evidence identified by the State or unit of local government under paragraph (2)(B)(ii), since the previous reporting period.

"(viii) The cumulative total number of samples of sexual assault evidence described under clause (iii) for which the State or unit of local government will be barred within 12 months by any applicable statute of limitations from prosecuting a perpetrator of the sexual assault to which the sample relates.

"(C) PUBLICATION OF REPORTS.—Not later than 7 days after the submission of a report under this paragraph by a State or unit of local government, the Attorney General shall, subject to subparagraph (O), publish and disseminate a facsimile of the full contents of such report on an appropriate internet website.

"(O) PERSONALLY IDENTIFIABLE INFORMATION.—The Attorney General shall ensure that any information published and disseminated as part of a report under this paragraph, which reports information under this subsection, does not include personally identifiable information or details about a sexual assault that might lead to the identification of the individuals involved.

"(K) OPTIMAL REPORTING.—The Attorney General shall—

"(i) at the discretion of a State or unit of local government required to file a report under subparagraph (A), allow such State or unit of local government, at its sole discretion, to submit such reports on a more frequent basis; and

"(ii) make available to all States and units of local government the reporting form created pursuant to subparagraph (A), whether or not they are required
S. 77

to submit such reports, and allow such States or units of local government, at their sole discretion, to submit such reports for publication.

(f) SAMPLES GUNKY FROM REPORTING REQUIREMENTS.—The reporting requirements described in paragraph (e) shall not apply to a sample of sexual assault evidence that—

(i) is not considered criminal evidence (such as a sample collected anonymously from a victim who is unwilling to make a criminal complaint); or

(ii) relates to a sexual assault for which the prosecution of such perpetrator is barred by a statute of limitations.

(6) DEFINITIONS.—In this subsection:

(A) AWAITING TESTING.—The term "awaiting testing" means, with respect to a sample of sexual assault evidence, that—

(i) the sample has been collected and is in the possession of a State or unit of local government;

(ii) DNA and other appropriate forensic analyses have not been performed on such sample; and

(iii) the sample is related to a criminal case or investigation in which final disposition has not yet been reached.

(B) FINAL DISPOSITION.—The term "final disposition" means, with respect to a criminal case or investigation to which a sample of sexual assault evidence relates—

(i) the conviction or acquittal of all suspected perpetrators of the crime involved;

(ii) a determination by the State or unit of local government in possession of the sample that the case is unfounded; or

(iii) a declaration by the victim of the crime involved that the act constituting the basis of the crime was not committed.

(C) POSSESSION.—

(i) IN GENERAL.—The term "possession", used with respect to possession of a sample of sexual assault evidence by a State or unit of local government, includes possession by an individual who is acting as an agent of the State or unit of local government for the collection of the sample.

(ii) RULE OF CONSTRUCTION.—Nothing in clause (i) shall be construed to create or amend any Federal rights or privileges for non-governmental vendor laboratories described in regulations promulgated under section 210303 of the DNA Identification Act of 1994 (42 U.S.C. 14133).

(a) ESTABLISHMENT OF PROTOCOLS, TECHNICAL ASSISTANCE, AND DEFINITIONS.

(1) PROTOCOLS AND PRACTICES.—Not later than 18 months after the date of enactment of the SAFE Act of 2013, the Director, in consultation with Federal, State, and local law enforcement agencies and government laboratories, shall develop and publish a description of protocols and practices the Director considers appropriate for the accurate, timely, and effective collection and processing of DNA evidence,
including protocols and practices specific to sexual assault cases, which shall address appropriate steps in the investigation of cases that might involve DNA evidence, including—

(A) how to determine—

(i) which evidence is to be collected by law enforcement personnel and forwarded for testing;

(ii) the preferred order in which evidence from the same case is to be tested; and

(iii) what information to take into account when establishing the order in which evidence from different cases is to be tested;

(B) the establishment of a reasonable period of time in which evidence is to be forwarded by emergency response providers, law enforcement personnel, and prosecutors to a laboratory for testing;

(C) the establishment of reasonable periods of time in which each stage of analytical laboratory testing is to be completed;

(D) systems to encourage communication within a State or unit of local government among emergency response providers, law enforcement personnel, prosecutors, courts, defense counsel, crime laboratory personnel, and crime victims regarding the status of crime scene evidence to be tested; and

(E) standards for conducting the audit of the backlog for DNA case work in sexual assault cases required under subsection (a).

(3) TECHNICAL ASSISTANCE AND TRAINING.—The Director shall make available technical assistance and training to support States and units of local government in adopting and implementing the protocols and practices developed under paragraph (1) on and after the date on which the protocols and practices are published.

(3) Definitions.—In this subsection, the terms 'awaiting testing' and 'possession' have the meanings given these terms in subsection (a)."

SEC. 1002. REPORTS TO CONGRESS.

Not later than 90 days after the end of each fiscal year for which a grant is made for the purpose described in section 3(a)(7) of the DNA Analysis Backlog Elimination Act of 2000, as amended by section 1002, the Attorney General shall submit to Congress a report that—

(1) lists the States and units of local government that have been awarded such grants and the amount of the grant received by each such State or unit of local government;

(2) states the number of extensions granted by the Attorney General under subsection 2(b)(3) of the DNA Analysis Backlog Elimination Act of 2000, as added by section 1002; and

(3) summarizes the processing status of the samples of sexual assault evidence identified in Sexual Assault Forensic Evidence Reports established under section 2(m)(3) of the DNA Analysis Backlog Elimination Act of 2000, including the number of samples that have not been tested.

SEC. 1003. REDUCING THE HAPE KIT BACKLOG.

Section 2(c)(3) of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135(c)(3)) is amended—
(a) in subparagraph (B), by striking "2014" and inserting "2018"; and
(b) by adding at the end the following:
"(C) For each of fiscal years 2014 through 2018, not less than 75 percent of the total grant amounts shall be awarded for a combination of purposes under paragraphs (1), (2), and (3) of subsection (a)."

SEC. 1065. OVERSIGHT AND ACCOUNTABILITY.

All grants awarded by the Department of Justice that are authorized under this title shall be subject to the following:

(1) AUDIT REQUIREMENT.—Beginning in fiscal year 2015, and each fiscal year thereafter, the Inspector General of the Department of Justice shall conduct audits of recipients of grants under this title to prevent waste, fraud, and abuse of funds by grantees. The Inspector General shall determine the appropriate number of grantees to be audited each year.

(2) MANDATORY EXCLUSION.—A recipient of grant funds under this title that is found to have an unresolved audit finding shall not be eligible to receive grant funds under this title during the 2 fiscal years beginning after the 12-month period described in paragraph (5).

(3) PRIORITY.—In awarding grants under this title, the Attorney General shall give priority to eligible entities that, during the 2 fiscal years before submitting an application for a grant under this title, did not have an unresolved audit finding showing a violation in the terms or conditions of a Department of Justice grant program.

(4) REMUNERATION.—If an entity is awarded grant funds under this Act during the 2-fiscal-year period in which the entity is barred from receiving grants under paragraph (2), the Attorney General shall—
(A) deposit an amount equal to the grant funds that were improperly awarded to the grantee into the General Fund of the Treasury; and
(B) seek to recoup the costs of the repayment to the grantee from the grant recipient that was erroneously awarded grant funds.

(5) DEFINED TERM.—In this section, the term "unresolved audit finding" means an audit report finding in the final audit report of the Inspector General of the Department of Justice that the grantee has utilized grant funds for an unauthorized expenditure or otherwise unallowable cost that is not closed or resolved within a 12-month period beginning on the date when the final audit report is issued.

(6) NONPROFIT ORGANIZATION REQUIREMENTS.—
(A) DEFINITION.—For purposes of this section and the grant programs described in this title, the term "nonprofit organization" means an organization that is described in section 501(c)(3) of the Internal Revenue Code of 1986 and is exempt from taxation under section 501(a) of such Code.

(B) PROHIBITION.—The Attorney General shall not award a grant under any grant program described in this title to a nonprofit organization that holds money in offshore accounts for the purpose of avoiding paying the tax
described in section 611(a) of the Internal Revenue Code of 1986.

(C) DISCLOSURE.—Each nonprofit organization that is awarded a grant under a grant program described in this title and uses the procedures prescribed in regulations to create a rebuttable presumption of reasonableness for the compensation of its officers, directors, trustees and key employees, shall disclose to the Attorney General, in the application for the grant, the process for determining such compensation, including the independent person involved in reviewing and approving such compensation, the comparability data used, and contemporaneous substantiation of the deliberation and decision. Upon request, the Attorney General shall make the information disclosed under this subsection available for public inspection.

(7) ADMINISTRATIVE EXPENSES.—Unless otherwise explicitly provided in authorizing legislation, not more than 7.5 percent of the amounts authorized to be appropriated under this title may be used by the Attorney General for salaries and administrative expenses of the Department of Justice.

(6) CONFERENCE EXPENDITURES—

(A) LIMITATION.—No amounts authorized to be appropriated to the Department of Justice under this title may be used by the Attorney General or by any individual or organization awarded discretionary funds through a cooperative agreement under this Act, to host or support any expenditure for conferences that uses more than $20,000 in Department funds, unless the Deputy Attorney General or the appropriate Assistant Attorney General, Director, or principal deputy as the Deputy Attorney General may designate, provides prior written authorization that the funds may be expended to host a conference.

(B) WRITTEN APPROVAL.—Written approval under subparagraph (A) shall include a written estimate of all costs associated with the conference, including the cost of all food and beverages, audiovisual equipment, honoraria for speakers, and any entertainment.

(C) REPORT.—The Deputy Attorney General shall submit an annual report to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives on all conference expenditures approved by operation of this paragraph.

(3) PROHIBITION ON LOBBYING ACTIVITY.—

(A) IN GENERAL.—Amounts authorized to be appropriated under this title may not be utilized by any grant recipient to—

(i) lobby any representative of the Department of Justice regarding the award of grant funding; or

(ii) lobby any representative of a Federal, state, local, or tribal government regarding the award of grant funding.

(B) PENALTY.—If the Attorney General determines that any recipient of a grant under this title has violated subparagraph (A), the Attorney General shall—

(i) require the grant recipient to repay the grant in full; and
(g) prohibit the grant recipient from receiving another grant under this title for not less than 5 years.

SEC. 1006. SUNSET.

Effective on December 31, 2013, subsections (a)(6) and (a) of section 3 of the DNA Analysis Backlog Elimination Act of 2009 (42 U.S.C. 14136(a)(6) and (a)) are repealed.

TITLE XI—OTHER MATTERS

SEC. 1101. SEXUAL ABUSE IN CUSTODIAL SETTINGS.

(a) SUITS BY PERSONS.—Section 7(c) of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997e(c)) is amended by inserting before the period at the end the following: "or the commission of a sexual act (as defined in section 2246 of title 18, United States Code)".

(b) UNITED STATES AS DEFENDANT.—Section 1983(b)(2) of title 42, United States Code, is amended by inserting before the period at the end the following: "or the commission of a sexual act (as defined in section 2246 of title 18)".

(c) ADOPTION AND EFFECT OF NATIONAL STANDARDS.—Section 8 of the Prison Rape Elimination Act of 2003 (42 U.S.C. 15957) is amended—

(1) by redesignating subsection (c) as subsection (e); and

(2) by inserting after subsection (b) the following:

"(c) APPLICABILITY TO DETENTION FACILITIES OPERATED BY THE DEPARTMENT OF HOMELAND SECURITY.—

"(1) In general.—Not later than 180 days after the date of enactment of the Violence Against Women Reauthorization Act of 2013, the Secretary of Homeland Security shall publish a final rule adopting national standards for the detection, prevention, reduction, and punishment of rape and sexual assault in facilities that maintain custody of aliens detained for a violation of the immigration laws of the United States.

"(2) APPLICABILITY.—The standards adopted under paragraph (1) shall apply to detention facilities operated by the Department of Homeland Security and to detention facilities operated under contract with the Department.

"(3) COMPLIANCE.—The Secretary of Homeland Security shall—

(A) assess compliance with the standards adopted under paragraph (1) on a regular basis; and

(B) include the results of the assessments in performance evaluations of facilities completed by the Department of Homeland Security.

"(A) CONSIDERATIONS.—In adopting standards under paragraph (1), the Secretary of Homeland Security shall give due consideration to the recommended national standards provided by the Commission under section 7(e).

"(b) DEFINITION.—As used in this section, the term ‘detention facilities operated under contract with the Department’ includes, but is not limited to contract detention facilities and detention facilities operated through an intergovernmental service agreement with the Department of Homeland Security.

"(d) APPLICABILITY TO CUSTODIAL FACILITIES OPERATED BY THE DEPARTMENT OF HEALTH AND HUMAN SERVICES.—
"(1) In general.—Not later than 180 days after the date of enactment of the Violence Against Women Reauthorization Act of 2013, the Secretary of Health and Human Services shall publish a final rule adopting national standards for the detection, prevention, reduction, and punishment of rape and sexual assault in facilities that maintain custody of unaccompanied alien children (as defined in section 462(e) of the Homeland Security Act of 2002 (6 U.S.C. 279qgi)).

"(2) Applicability.—The standards adopted under paragraph (1) shall apply to facilities operated by the Department of Health and Human Services and to facilities operated under contract with the Department.

"(3) Compliance.—The Secretary of Health and Human Services shall—

(A) assess compliance with the standards adopted under paragraph (1) on a regular basis; and

(B) include the results of the assessments in performance evaluations of facilities completed by the Department of Health and Human Services.

"(4) Considerations.—In adopting standards under paragraph (1), the Secretary of Health and Human Services shall give due consideration to the recommended national standards provided by the Commission under section 7(e)."

SEC. 4102. ANONYMOUS ONLINE HARASSMENT.

Section 223(a)(1) of the Communications Act of 1934 (47 U.S.C. 223(a)(1)) is amended—

(1) in subparagraph (A), in the undesignated matter following clause (6), by striking "unnatural");

(2) in subparagraph (C)—

(A) by striking "annoy"); and

(B) by striking "harass any person at the called number or who receives the communication" and inserting "harass any specific person"; and

(3) in subparagraph (B), by striking "harass any person at the called number or who receives the communication" and inserting "harass any specific person".

SEC. 4103. STALKER DATABASE.

Section 40603 of the Violence Against Women Act of 1994 (42 U.S.C. 14052) is amended by striking "$3,000,000" and all that follows and inserting "$3,000,000 for fiscal years 2014 through 2018".

SEC. 4104. FEDERAL VICTIM ADVOCATES REAUTHORIZATION.

Section 40114 of the Violence Against Women Act of 1994 (Public Law 103-322; 108 Stat. 1910) is amended by striking "fiscal years 2007 through 2011" and inserting "fiscal years 2014 through 2018".

SEC. 4105. CHILD ABUSE TRAINING PROGRAMS FOR JUDICIAL PERSONNEL AND PRACTITIONERS REAUTHORIZATION.

Subtitle C of the Victims of Child Abuse Act of 1990 (42 U.S.C. 10804) is amended in subsection (a) by striking "$5,300,000" and all that follows and inserting "$5,300,000 for each of fiscal years 2014 through 2018".
TITLE XII—TRAFFICKING VICTIMS PROTECTION

Subtitle A—Combating International Trafficking in Persons

SEC. 1261. REGIONAL STRATEGIES FOR COMBATING TRAFFICKING IN PERSONS.

Section 106 of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7102) is amended—

(1) in subsection (d)(7)(A), by striking "section 106(c) of this division" and inserting "subsection (c)";
(2) in subsection (a)(2)—
   (A) by striking "(2) COORDINATION OF CRIMINAL ACTIVITIES.—" and all that follows through "exploitation";
   (B) by redesignating subparagraph (B) as paragraph (2), and moving such paragraph, as so redesignated, 2 ems to the left, and
   (C) by redesignating clauses (i) and (ii) as subparagraphs (A) and (B), respectively, and moving such subparagraphs, as so redesignated, 2 ems to the left;
(3) by redesignating subsection (d) as subsection (e); and
(4) by inserting after subsection (a) the following:

"(7) REGIONAL STRATEGIES FOR COMBATING TRAFFICKING IN PERSONS.—Each regional bureau in the Department of State shall contribute to the realization of the anti-trafficking goals and objectives of the Secretary of State. Each year, in cooperation with the Office to Monitor and Combat Trafficking in Persons, each regional bureau shall submit a list of anti-trafficking goals and objectives to the Secretary of State for each country in the geographic area of responsibilities of the regional bureau. Host governments shall be informed of the goals and objectives for their particular country and, to the extent possible, host government officials should be consulted regarding the goals and objectives."

SEC. 1262. PARTNERSHIPS AGAINST SIGNIFICANT TRAFFICKING IN PERSONS.

The Trafficking Victims Protection Act of 2000 is amended by inserting after section 106 (22 U.S.C. 7102) the following:

"SEC. 106A. CREATING, BUILDING, AND STRENGTHENING PARTNERSHIPS AGAINST SIGNIFICANT TRAFFICKING IN PERSONS.

(a) DECLARATION OF PURPOSE.—The purpose of this section is to promote collaboration and cooperation—

(1) between the United States Government and governments listed on the annual Trafficking in Persons Report;
(2) between foreign governments and civil society actors; and
(3) between the United States Government and private sector entities.

(b) PARTNERSHIPS.—The Director of the office established pursuant to section 106(a)(1) of this Act, in coordination and cooperation with other officials at the Department of State, officials at the Department of Labor, and other relevant officials of the
United States Government, shall promote, build, and sustain partnerships between the United States Government and private entities, including foundations, universities, corporations, community-based organizations, and other nongovernmental organizations, to ensure that—

(1) United States citizens do not use any item, product, or material produced or extracted with the use and labor from victims of severe forms of trafficking; and

(2) such entities do not contribute to trafficking in persons involving sexual exploitation.

(c) Program to Address Emergency Situations.—The Secretary of State, acting through the Director established pursuant to section 1056(a)(1) of this Act, is authorized to establish a fund to assist foreign governments in meeting unexpected, urgent needs in prevention of trafficking in persons, protection of victims, and prosecution of trafficking offenders.

(d) Child Protection Compacts.—

(1) In general.—The Secretary of State, in consultation with the Administrator of the United States Agency for International Development, the Secretary of Labor, and the heads of other relevant agencies, is authorized to provide assistance under this section for each country that enters into a child protection compact with the United States to support policies and programs that—

(A) prevent and respond to violence, exploitation, and abuse against children; and

(B) measurably reduce the trafficking of minors by building sustainable and effective systems of justice, prevention, and protection.

(2) Elements.—A child protection compact under this subsection shall establish a multi-year plan for achieving shared objectives in furtherance of the purposes of this Act. The compact should take into account, if applicable, the national child protection strategies and national action plans for human trafficking of a country, and shall describe—

(A) the specific objectives the foreign government and the United States Government expect to achieve during the term of the compact;

(B) the responsibilities of the foreign government and the United States Government in the achievement of such objectives;

(C) the particular programs or initiatives to be undertaken in the achievement of such objectives and the amount of funding to be allocated to each program or initiative by both countries;

(D) regular outcome indicators to monitor and measure progress toward achieving such objectives;

(E) a multi-year financial plan, including the estimated amount of contributions by the United States Government and the foreign government, and proposed mechanisms to implement the plan and provide oversight;

(F) how a country strategy will be developed to sustain progress made toward achieving such objectives after expiration of the compact; and

(G) how child protection data will be collected, tracked, and managed to provide strengthened case management and policy planning.
SEC. 216A. PROTECTION AND ASSISTANCE FOR VICTIMS OF TRAFFICKING.

(a) Task Force Activities.—Section 106(d)(6) of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7109(d)(6)) is amended by inserting "*" and make reasonable efforts to distribute information to enable all relevant Federal Government agencies
to publicize the National Human Trafficking Resource Center Hotline on their websites, in all headquarters offices, and in all field offices throughout the United States" before the period at the end.

(b) CONGRESSIONAL REPORT.—Section 107(a)(19) of the "Trafficking Victims Protection Act of 2000 (22 U.S.C. 7106(a)(19)) is amended by inserting "and shall brief Congress annually on such efforts" before the period at the end.

SEC. 1204. MINIMUM STANDARDS FOR THE ELIMINATION OF TRAFFICKING.

Section 101(b) of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7101(b)) is amended—

(1) in paragraph (3)—

(A) by striking "peacekeeping" and inserting "diplomatic, peacekeeping;"

(B) by striking ";" and inserting ", a transparent system for remedying or punishing such public officials as a deterrent, measures;" and

(C) by inserting ", effective bilateral, multilateral, or regional information sharing and cooperation arrangements with other countries, and effective policies or laws regulating foreign labor recruiting and holding them civilly and criminally liable for fraudulent recruiting" before the period at the end;

(2) in paragraph (4), by inserting "and has entered into bilateral, multilateral, or regional law enforcement cooperation and coordination arrangements with other countries" before the period at the end;

(3) in paragraph (7)—

(A) by inserting ", including diplomats and soldiers," after "public officials;"

(B) by striking "peacekeeping" and inserting "diplomatic, peacekeeping;" and

(C) by inserting "A government's failure to appropriately address public allegations against such public officials, especially once such officials have returned to their home countries, shall be considered inaction under these criteria," after "traffic their;"

(4) by redesignating paragraphs (9) through (11) as paragraphs (10) through (12), respectively; and

(5) by inserting after paragraph (6) the following:

"9) Whether the government has entered into effective, transparent partnerships, cooperative arrangements, or agreements that have resulted in concrete and measurable outcomes with—

"(A) domestic civil society organizations, private sector entities, or international nongovernmental organizations, or into bilateral or regional arrangements or agreements, to assist the government's efforts to prevent trafficking, protect victims, and punish traffickers; or

"(B) the United States toward agreed goals and objectives in the collective fight against trafficking.";

SEC. 1205. BEST PRACTICES IN TRAFFICKING IN PERSONS ERIADUCTION.

Section 110(b) of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7107(b)) is amended—

(1) in paragraph (1)—
S. 47—87

(A) by striking "with respect to the status of severe forms of trafficking in persons that shall include—" and inserting "describing the anti-trafficking efforts of the United States and foreign governments according to the minimum standards and criteria established in section 105, and the nature and scope of trafficking in persons in each country and analysis of the trend lines for individual governmental efforts. The report should include—"

(B) in subparagraph (B), by striking "; and" and inserting a semicolon;

(C) in subparagraph (F), by striking the period at the end and inserting "; and"; and

(D) by inserting at the end the following:

"(G) a section entitled "Promising Practices in the Eradication of Trafficking in Persons" to highlight effective practices and use of innovation and technology in prevention, protection, prosecution, and partnerships, including by foreign governments, the private sector, and domestic civil society actors.";

(2) by striking paragraph (2);

(3) by redesignating paragraphs (3) and (4) as paragraphs (2) and (3), respectively; and

(4) in paragraph (2), as redesignated, by adding at the end the following:

"(C) PUBLIC NOTICE.—Not later than 30 days after notifying Congress of each country determined to have met the requirements under clauses (I) through (III) of subparagraph (D)(I), the Secretary of State shall provide a detailed description of the credible evidence supporting such determination on a publicly available website maintained by the Department of State.".

SEC. 1009. PROTECTIONS FOR DOMESTIC WORKERS AND OTHER NON-IMMIGRANTS.

Section 202 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (2 U.S.C. 1560a) is amended—

(1) in subsection (a)—

(A) in the subsection heading, by inserting "AND VIDEO FOR CONSULAR WAITING ROOMS" after "INFORMATION PAMPHLET"; and

(B) in paragraph (1)—

(i) by inserting "and video" after "information pamphlet"; and

(ii) by adding at the end the following: "The video shall be distributed and shown in consular waiting rooms in embassies and consulates appropriate to the circumstances that are determined to have the greatest concentration of employment or education-based non-immigrant visa applicants, and where sufficient video facilities exist in waiting or other rooms where applicants wait or convene. The Secretary of State is authorized to augment video facilities in such consulates or embassies in order to fulfill the purposes of this section.";
(2) in subsection (b), by inserting "and video" after "information pamphlet;"
(3) in subsection (c)---
(A) in paragraph (1), by inserting "and produce or dub the video" after "information pamphlet;" and
(B) in paragraph (2), by inserting "and the video produced or dubbed" after "translated;" and
(4) in subsection (d)---
(A) in paragraph (1), by inserting "and video" after "information pamphlet;"
(B) in paragraph (2), by inserting "and video" after "information pamphlet;" and
(C) by adding at the end the following:
"4) DEADLINE FOR VIDEO DEVELOPMENT AND DISTRIBUTION.—Not later than 1 year after the date of the enactment of the Violence Against Women Reauthorization Act of 2013, the Secretary of State shall make available the video developed under subsection (a) produced or dubbed in all the languages referred to in subsection (a)."

SEC. 107. PREVENTION OF CHILD MARRIAGE.

(a) IN GENERAL.—Section 106 of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7104) is amended by adding at the end the following:

"(c) PREVENTION OF CHILD TRAFFICKING THROUGH CHILD MARRIAGE.—The Secretary of State shall establish and implement a multi-year, multi-sectoral strategy---
"(1) to prevent child marriage;
"(2) to promote the empowerment of girls at risk of child marriage in developing countries;
"(3) that should address the unique needs, vulnerabilities, and potential of girls younger than 18 years of age in developing countries;
"(4) that targets areas in developing countries with high prevalence of child marriage; and
"(5) that includes diplomatic and programmatic initiatives.

(b) INCLUSION OF CHILD MARRIAGE STATUS IN REPORTS.—The Foreign Assistance Act of 1961 (22 U.S.C. 2151 et seq.) is amended—

(1) in section 116 (22 U.S.C. 2151n), by adding at the end the following:
"
"(g) CHILD MARRIAGE STATUS.—
"(1) IN GENERAL.—The report required under subsection (d) shall include, for each country in which child marriage is prevalent, a description of the status of the practice of child marriage in such country.
"(2) DEFINED TERM.—In this subsection, the term 'child marriage' means the marriage of a girl or boy who is---
"(A) younger than the minimum age for marriage under the laws of the country in which such girl or boy is a resident; or
"(B) younger than 18 years of age, if no such law exists; and

(2) in section 502B (22 U.S.C. 2304), by adding at the end the following:
"
"(c) CHILD MARRIAGE STATUS.—
"(1) IN GENERAL.—The report required under subsection (b) shall include, for each country in which child marriage is prevalent, a description of the status of the practice of child marriage in each country.

"(2) DEFINED TERM.—In this subsection, the term 'child marriage' means the marriage of a girl or boy who is—

"(A) younger than the minimum age for marriage under the laws of the country in which such girl or boy is a resident; or

"(B) younger than 18 years of age, if no such law exists.

SEC. 1111. CHILD SOLDIERS.

Section 404 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (22 U.S.C. 2371d–1) is amended—

(1) in subsection (a), by striking "(b), (c), and (d), the authorities contained in section 515 or 541 of the Foreign Assistance Act of 1961 (22 U.S.C. 2371d–1) or 2347) and inserting "(b) through (f), the authorities contained in sections 516, 541, and 561 of the Foreign Assistance Act of 1961 (22 U.S.C. 2371d–1, 2347, and 2348)";

(2) by adding at the end the following:

"(f) EXCEPTION FOR PEACEKEEPING OPERATIONS.—The limitation set forth in subsection (a) that relates to section 551 of the Foreign Assistance Act of 1961 shall not apply to programs that support military professionalization, security sector reform, heightened respect for human rights, peacekeeping preparation, or the demobilization and reintegration of child soldiers."

Subtitle B—Combating Trafficking in Persons in the United States

PART I—PENALTIES AGAINST TRAFFICKERS AND OTHER CRIMES

SEC. 1301. CRIMINAL TRAFFICKING OFFENSES.

(a) RICO AMENDMENT.—Section 1961(1)(B) of title 18, United States Code, is amended by inserting "section 1595 (relating to fraud in foreign labor contracting)," before "section 1425".

(b) ENGAGING IN ILLEGAL SEXUAL CONDUCT IN FOREIGN PLACES.—Section 545(b) of title 18, United States Code, is amended by inserting "or resides, either temporarily or permanently, in a foreign country" after "sojourner".

(c) UNLAWFUL CONDUCT WITH RESPECT TO DOCUMENTS.—

(1) IN GENERAL.—Chapter 77 of title 18, United States Code, is amended by adding at the end the following:

"§ 1597. Unlawful conduct with respect to immigration documents

(a) DESTRUCTION, CONCEALMENT, REMOVAL, CONSPICUOUS OR POSSESSION OF IMMIGRATION DOCUMENTS.—It shall be unlawful for any person to knowingly destroy, conceal, remove, confiscate, or possess, an actual or purported passport or other immigration document of another individual—"
"(1) in the course of violating section 1351 of this title or section 274 of the Immigration and Nationality Act (8 U.S.C. 1351); or
(2) with intent to violate section 1351 of this title or section 274 of the Immigration and Nationality Act (8 U.S.C. 1351); or
(3) in order to, without lawful authority, maintain, prevent, or restrict the labor of services of the individual.

"(b) Penalty.—Any person who violates subsection (a) shall be fined under this title, imprisoned for not more than 1 year, or both.

"(c) Obstruction.—Any person who knowingly obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be subject to the penalties described in subsection (b).

(2) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 77 of title 18, United States Code, is amended by adding at the end the following:

"1397. Unlawful conduct with respect to immigration documents."

SEC. 1113. CIVIL REMEDIES; CLARIFYING DEFINITION.

(a) CIVIL REMEDIES FOR PERSONAL INJURY.—Section 2255 of title 18, United States Code, is amended—

(1) in subsection (a), by striking "section 2241(c)" and inserting "section 1553, 1639A, 1639B, 1641(c), 1651, 1641(c)"; and

(2) in subsection (b), by striking "six years" and inserting "10 years".

(b) DEFINITION.—

(1) IN GENERAL.—Section 103 of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7102) is amended—

(A) by redesignating paragraphs (1) through (14) as paragraphs (2) through (15), respectively;

(B) by inserting before paragraph (2), as redesignated, the following:

"(1) Abuse or threatened abuse of law or legal process.—The term 'abuse or threatened abuse of the legal process' means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action;

"(2) by inserting before paragraph (2), as redesignated, by striking "paragraph (5)" and inserting "paragraph (9)"; and

(C) in paragraph (14), as redesignated, by striking "paragraph (17)" and inserting "paragraph (21)".

(2) TECHNICAL AND CONFORMING AMENDMENTS.—

(A) TRAFFICKING VICTIMS PROTECTION ACT OF 2000.—The Trafficking Victims Protection Act of 2000 (22 U.S.C. 7101 et seq.) is amended—

(i) in section 110(e)(2) (22 U.S.C. 7107(c)(2))—

(1) by striking "section 103(7)(A)" and inserting "section 103(7)(A); and

(ii) by striking "section 103(7)(B)" and inserting "section 103(7)(B); and

(ii) by striking "section 103(8)(F)" and inserting "section 103(8)(F); and

(ii) in section 115(p)(2) (22 U.S.C. 7110(p)(2)), by striking "section 103(9)(A)" and inserting "section 103(9)(A)."
S. 47—91

SEC. 305. (B) NORTH KOREAN HUMAN RIGHTS ACT OF 2004.—Section 203(b)(3) of the North Korean Human Rights Act of 2004 (22 U.S.C. 7835(b)(3)) is amended by striking “section 103(b)(1)” and inserting “section 103(b)(2)”.


(1) in paragraph (1), by striking “section 103(b)” and inserting “section 103(b)”; and

(2) in paragraph (2), by striking “section 103(b)” and inserting “section 103(b)”; and

(3) in paragraph (3), by striking “section 103(b)” and inserting “section 103(b)”.

SEC. 311. VIOLENCE AGAINST WOMEN AND DEPARTMENT OF JUSTICE REAUTHORIZATION ACT OF 2009.—Section 111(b)(1) of the Violence Against Women Act, as reauthorized by the Trafficking Victims Protection Reauthorization Act of 2008 (22 U.S.C. 14014(a)(3)) is amended by striking “paragraph (8)” and inserting “paragraph (9)”.

PART II—ENSURING AVAILABILITY OF POSSIBLE WITNESSES AND INFORMANTS

SEC. 101. PROTECTIONS FOR TRAFFICKING VICTIMS WHO COOPERATE WITH LAW ENFORCEMENT.

Section 101(a)(15)(T)(iii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(T)(iii)) is amended by inserting “or of any adult or minor child of a derivative beneficiary of the alien, as after “age”.

SEC. 102. PROTECTION AGAINST FRAUD IN FOREIGN LABOR CONTRACTING.


PART III—ENSURING INTERAGENCY COORDINATION AND EXPANDED REPORTING

SEC. 103. REPORTING REQUIREMENTS FOR THE ATTORNEY GENERAL.

Section 105A(7) of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7105A(7)) is amended—

(1) by redesignating subparagraphs (D) through (J) as subparagraphs (J) through (O); and

(2) by striking subparagraphs (B) and (C) and inserting the following:

“(B) the number of persons who have been granted continued presence in the United States under section 107(c)(3) during the preceding fiscal year and the mean and median time taken to adjudicate applications submitted under such section, including the time from the receipt of an application by law enforcement to the issuance of continued presence, and a description of any efforts being taken to reduce the adjudication and processing time
while ensuring the safe and competent processing of the applications;

(3) the number of persons who have applied for, been granted, or been denied a visa or otherwise provided status under subparagraph (T)(ii) or (U)(ii) of section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)) during the preceding fiscal year;

(9) the number of persons who have applied for, been granted, or been denied a visa or status under clause (ii) of section 101(a)(15)(T) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(T)) during the preceding fiscal year, broken down by the number of such persons described in subclauses (I), (II), and (III) of such clause (ii);

(10) the amount of Federal funds expended in direct benefits paid to individuals described in subparagraph (D) in conjunction with T visa status;

(11) the number of persons who have applied for, been granted, or been denied a visa or status under section 101(a)(15)(U)(ii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(U)(ii)) during the preceding fiscal year;

(11) the mean and median time in which it takes to adjudicate applications submitted under the provisions of law set forth in subparagraph (C), including the time between the receipt of an application and the issuance of a visa and work authorization;

(12) any efforts being taken to reduce the adjudication and processing time, while ensuring the safe and competent processing of the applications; 

(3) in subparagraph (N)(iii), as redesignated, by striking "and" at the end;

(4) in subparagraph (O), as redesignated, by striking the period at the end and inserting "; and"; and

(5) by adding at the end the following:

(13) the activities undertaken by Federal agencies to train appropriate State, tribal, and local government and law enforcement officials to identify victims of severe forms of trafficking, including both sex and labor trafficking;

(14) the activities undertaken by Federal agencies in cooperation with State, tribal, and local law enforcement officials to identify, investigate, and prosecute offenses under sections 1581, 1583, 1584, 1586, 1590, 1591, and 1594 of title 18, United States Code, or equivalent State offenses, including, in each fiscal year—

(i) the number, age, gender, country of origin, and citizenship status of victims identified for each offense;

(ii) the number of individuals charged, and the number of individuals convicted, under each offense;

(iii) the number of individuals referred for prosecution for State offenses, including offenses relating to the purchasing of commercial sex acts;

(iv) the number of victims granted continued presence in the United States under section 101(c)(15); and

(v) the number of victims granted a visa or otherwise provided status under subparagraph (T)(ii) of
S. 47—93

(4) of section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)); and

"(3) the activities undertaken by the Department of Justice and the Department of Health and Human Services to meet the specific needs of minor victims of domestic trafficking, including actions taken pursuant to subsection (f) and section 205(a) of the Trafficking Victims Protection Reauthorization Act of 2005 (42 U.S.C. 14044(g)), and the steps taken to increase cooperation among Federal agencies to ensure the effective and efficient use of programs for which the victims are eligible.".

SEC. 1253. IMPORTING REQUIREMENTS FOR THE SECRETARY OF LABOR.

Section 108(b) of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7112(b)) is amended by adding at the end the following:

"(3) Submission to Congress.—Not later than December 1, 2014, and every 2 years thereafter, the Secretary of Labor shall submit the list described under paragraph (3)(C) to Congress."

SEC. 1254. INFORMATION SHARING TO COMBAT CHILD LABOR AND SLAVE LABOR.

Section 108(a) of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7112(a)) is amended by adding at the end the following:

"(3) Information Sharing.—The Secretary of State shall, on a regular basis, provide information relating to child labor and forced labor in the production of goods in violation of international standards to the Department of Labor to be used in developing the list described in subsection (3)(C)."

SEC. 1254. GOVERNMENT TRAINING EFFORTS TO INCLUDE THE DEPARTMENT OF LABOR.

Section 107(3)(4) of the Trafficking Victims Protection Act of 2000 (22 U.S.C. 7106(c)(4)) is amended—

(1) in the first sentence, by inserting "the Department of Labor, the Equal Employment Opportunity Commission," before "and the Department;" and

(2) in the second sentence, by inserting ", in consultation with the Secretary of Labor;" before "shall provide"

SEC. 1255. GAO REPORT ON THE USE OF FOREIGN LABOR CONTRACTORS.

(a) IN GENERAL.—Not later than 2 years after the date of the enactment of this Act, the Comptroller General of the United States shall submit a report on the use of foreign labor contractors to—

(1) the Committee on the Judiciary of the Senate;

(2) the Committee on Health, Education, Labor, and Pensions of the Senate;

(3) the Committee on the Judiciary of the House of Representatives; and

(4) the Committee on Education and the Workforce of the House of Representatives.

(b) CONTENTS.—The report under subsection (a) shall, to the extent possible—

(1) address the role and practices of United States employers in—
S. 47—94

(A) the use of labor recruiters or brokers; or
(B) directly recruiting foreign workers;
(2) analyze the laws that protect such workers, both overseas and domestically;
(3) describe the oversight and enforcement mechanisms in Federal departments and agencies for such laws; and
(4) identify any gaps that may exist in these protections; and
(5) reconvened possible actions for Federal departments and agencies to combat any abuses.
(c) REQUIREMENTS.—The report under subsection (a) shall—
(1) describe the role of labor recruiters or brokers working in countries that are sending workers and receiving funds, including any identified involvement in labor abuses;
(2) describe the role and practices of employers in the United States that commission labor recruiters or brokers or directly recruit foreign workers;
(3) describe the role of Federal departments and agencies in overseeing and regulating the foreign labor recruitment process, including certifying and enforcing under existing regulations;
(4) describe the type of jobs and the numbers of positions in the United States that have been filled through foreign workers during each of the last 8 years, including positions within the Federal Government;
(5) describe any efforts or programs undertaken by Federal, State and local government entities to encourage employers, directly or indirectly, to use foreign workers or to reward employers for using foreign workers; and
(6) based on the information required under paragraphs (1) through (5), identify any common abuses of foreign workers and the employment system, including the use of fees and debts, and recommendations of actions that could be taken by Federal departments and agencies to combat any identified abuses.

SEC. 123. ACCOUNTABILITY.

All grants awarded by the Attorney General under this title or an Act amended by this title shall be subject to the following accountability provisions:

(1) AUDIT REQUIREMENT.—
(A) DEFINITION.—In this paragraph, the term "unresolved audit finding" means an audit report finding in the final audit report of the Inspector General of the Department of Justice that the grantee has used grant funds for an unauthorized expenditure or otherwise unallowable cost that is not closed or resolved during the 12-month period beginning on the date on which the final audit report is issued.
(B) REQUIREMENT.—Beginning in the first fiscal year beginning after the date of enactment of this Act, and in each fiscal year thereafter, the Inspector General of the Department of Justice shall conduct audits of recipients of grants under this title or an Act amended by this title to prevent waste, fraud, and abuse of funds by grantees. The Inspector General shall determine the appropriate number of grantees to be audited each year.
C) Mandatory Exclusion.— A recipient of grant funds under this title or an Act amended by this title that is found to have an unresolved audit finding shall not be eligible to receive grant funds under this title or an Act amended by this title during the first 3 fiscal years beginning after the end of the 12-month period described in subparagraph (A).

D) Priority.— In awarding grants under this title or an Act amended by this title, the Attorney General shall give priority to eligible applicants that did not have an unresolved audit finding during the 3 fiscal years before submitting an application for a grant under this title or an Act amended by this title.

E) Reimbursement.— If an entity is awarded grant funds under this title or an Act amended by this title during the 3-fiscal-year period during which the entity is barred from receiving grants under subparagraph (C), the Attorney General shall—

1) deposit an amount equal to the amount of the grant funds that were improperly awarded to the grantee into the General Fund of the Treasury; and

2) seek to recoup the costs of the repayment to the fund from the grant recipient that was erroneously awarded grant funds.

C) Nonprofit Organization Requirements.—

A) Definition.— For purposes of this paragraph and the grant programs under this title or an Act amended by this title, the term "nonprofit organization" means an organization that is described in section 501(c)(3) of the Internal Revenue Code of 1986 and is exempt from taxation under section 501(a) of such Code.

B) Prohibition.— The Attorney General may not award a grant under this title or an Act amended by this title to a nonprofit organization that holds money in offshore accounts for the purpose of avoiding paying the tax described in section 611(a) of the Internal Revenue Code of 1986.

C) Disclosure.— Each nonprofit organization that is awarded a grant under this title or an Act amended by this title and uses the procedures prescribed in regulations to create a rebuttable presumption of reasonableness for the compensation of its officers, directors, trustees and key employees, shall disclose to the Attorney General, in the application for the grant, the process for determining such compensation, including the independent persons involved in reviewing and approving such compensation, the comparability data used, and contemporaneous substantiation of the deliberation and decision. Upon request, the Attorney General shall make the information disclosed under this subparagraph available for public inspection.

D) Conference Expenditures.—

A) Limitation.— No amounts authorized to be appropriated to the Department of Justice under this title or an Act amended by this title may be used by the Attorney General, or by any individual or entity awarded discretionary funds through a cooperative agreement under this
title or an Act amended by this title, to host or support any expenditure for conferences that uses more than $25,000 in funds made available to the Department of Justice, unless the Deputy Attorney General or the appropriate Assistant Attorney General, Director, or principal deputy (as designated by the Deputy Attorney General) provides prior written authorization that the funds may be expended to host the conference.

(B) WRITTEN APPROVAL.—Written approval under subparagraph (A) shall include a written estimate of all costs associated with the conference, including the cost of all food, beverages, audio-visual equipment, honoraria for speakers, and entertainment.

(C) REPORT.—The Deputy Attorney General shall submit an annual report to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives on all conference expenditures approved under this paragraph.

(4) ANNUAL CERTIFICATION.—Beginning in the first fiscal year beginning after the date of enactment of this Act, the Attorney General shall submit to the Committee on the Judiciary and the Committee on Appropriations of the Senate and the Committee on the Judiciary and the Committee on Appropriations of the House of Representatives, an annual certification indicating whether—

(A) all audits issued by the Office of the Inspector General under paragraph (1) have been completed and reviewed by the appropriate Assistant Attorney General or Director;

(B) all mandatory exclusions required under paragraph (1)(C) have been issued;

(C) all reimbursements required under paragraph (1)(B) have been made; and

(D) includes a list of any grant recipients excluded under paragraph (1) from the previous year.

PART IV—ENHANCING STATE AND LOCAL EFFORTS TO COMBAT TRAFFICKING IN PERSONS

SEC. 1241. ASSISTANCE FOR DOMESTIC MINOR SEX TRAFFICKING VICTIMS.

(a) IN GENERAL.—Section 205 of the Trafficking Victims Protection Reauthorization Act of 2005 (42 U.S.C. 1404a) is amended to read as follows:

"SEC. 205. ESTABLISHMENT OF A GRANT PROGRAM TO DEVELOP, EXTEND, AND STRENGTHEN ASSISTANCE PROGRAMS FOR CERTAIN PERSONS SUBJECT TO TRAFFICKING.

"(a) DEFINITIONS.—In this section:

"(1) ASSISTANT SECRETARY.—The term ‘Assistant Secretary’ means the Assistant Secretary for Children and Families of the Department of Health and Human Services;

"(2) ASSISTANT ATTORNEY GENERAL.—The term ‘Assistant Attorney General’ means the Assistant Attorney General for the Office of Justice Programs of the Department of Justice;
(C) Eligible entity.—The term 'eligible entity' means a State or unit of local government that—

(A) has significant criminal activity involving sex trafficking of minors;

(B) has demonstrated cooperation between Federal, State, local, and, where applicable, tribal law enforcement agencies, prosecutors, and social service providers in addressing sex trafficking of minors;

(C) has developed a workable, multi-disciplinary plan to combat sex trafficking of minors, including—

(i) building or establishing a residential care facility for minor victims of sex trafficking;

(ii) the provision of rehabilitative care to minor victims of sex trafficking;

(iii) the provision of specialized training for law enforcement officers and social service providers for all forms of sex trafficking, with a focus on sex trafficking of minors;

(iv) prevention, deterrence, and prosecution of offenses involving sex trafficking of minors;

(v) cooperation or referral agreements with organizations providing outreach or other related services to runaway and homeless youth; and

(vi) law enforcement protocols or procedures to screen all individuals arrested for prostitution, whether adult or minor, for victimization by sex trafficking and other crimes, such as sexual assault and domestic violence; and

(D) provides assurance that a minor victim of sex trafficking shall not be required to collaborate with law enforcement to have access to residential care or services provided with a grant under this section.

(D) Minor victim of sex trafficking.—The term 'minor victim of sex trafficking' means an individual who—

(A) is younger than 18 years of age, and is a victim of an offense described in section 1591(a) of title 18, United States Code, or a comparable State law; or

(B)(i) is a minor victim of sex trafficking; and

(ii) was younger than 18 years of age, was described in subparagraph (A); and

(iii) was receiving shelter or services as a minor victim of sex trafficking.

(E) Qualified nongovernmental organization.—The term 'qualified nongovernmental organization' means an organization that—

(A) is not a State or unit of local government, or an agency of a State or unit of local government;

(B)(i) has demonstrated experiences providing services to victims of sex trafficking or related populations (such as runaway and homeless youth), or employs staff specialized in the treatment of sex trafficking victims; and

(ii) demonstrates a plan to sustain the provision of services beyond the period of a grant awarded under this section.

(F) Sex trafficking of a minor.—The term 'sex trafficking of a minor' means an offense described in section 1591(a)
of title 18, United States Code, or a comparable State law, against a minor.

"(b) SEX TRAFFICKING BLOCK GRANTS.—

"(1) GRANTS AUTHORIZED.—

"(A) IN GENERAL.—The Assistant Attorney General, in consultation with the Assistant Secretary, may make block grants to 4 eligible entities located in different regions of the United States to combat sex trafficking of minors.

"(B) REQUIREMENT.—Not fewer than 1 of the block grants made under subparagraph (A) shall be awarded to an eligible entity with a State population of less than 5,000,000.

"(C) GRANT AMOUNT.—Subject to the availability of appropriations under subsection (g) to carry out this section, each grant made under this section shall be for an amount not less than $1,000,000 and not greater than $2,000,000.

"(D) DURATION.—

"(1) IN GENERAL.—A grant made under this section shall be for a period of 1 year.

"(2) RENEWAL.—

"(A) IN GENERAL.—The Assistant Attorney General may renew a grant under this section for up to 3 1-year periods.

"(B) PRIORITY.—In making grants in any fiscal year after the first fiscal year in which grants are made under this section, the Assistant Attorney General shall give priority to an eligible entity that received a grant in the preceding fiscal year and is eligible for renewal under this subparagraph, taking into account any evaluation of the eligible entity conducted under paragraph (4), if available.

"(2) CONSULTATION.—In carrying out this section, the Assistant Attorney General shall consult with the Assistant Secretary with respect to—

"(i) evaluations of grant recipients under paragraph (4);

"(ii) avoiding unintentional duplication of grants; and

"(iii) any other areas of shared concern.

"(2) USE OF FUNDS.—

"(A) ALLOCATION.—Not less than 67 percent of each grant made under paragraph (1) shall be used by the eligible entity to provide residential care and services (as described in clauses (i) through (v) of subparagraph (B)) to minor victims of sex trafficking through qualified non-governmental organizations.

"(B) AUTHORIZED ACTIVITIES.—Grants awarded pursuant to paragraph (2) may be used for—

"(i) providing residential care to minor victims of sex trafficking, including temporary or long-term placement as appropriate;

"(ii) providing 24-hour emergency social services response for minor victims of sex trafficking;
“(iii) providing minor victims of sex trafficking with clothing and other daily necessities needed to keep such victims from returning to living on the street;
(iv) case management services for minor victims of sex trafficking;
(v) mental health counseling for minor victims of sex trafficking, including specialized counseling and substance abuse treatment;
(vi) legal services for minor victims of sex trafficking;
(vii) specialized training for social service providers, public sector personnel, and private sector personnel likely to encounter sex trafficking victims on issues related to the sex trafficking of minors and severe forms of trafficking in persons;
(viii) outreach and education programs to provide information about deterrence and prevention of sex trafficking of minors;
(ix) programs to provide treatment to individuals charged or cited with purchasing or attempting to purchase sex acts in cases where—
(I) a treatment program can be mandated as a condition of a sentence, fine, suspended sentence, or probation, or is an appropriate alternative to criminal prosecution; and
(II) the individual was not charged with purchasing or attempting to purchase sex acts with a minor; and
(x) screening and referral of minor victims of severe forms of trafficking in persons.

(3) APPLICATION.—
(A) IN GENERAL.—Each eligible entity desiring a grant under this section shall submit an application to the Assistant Attorney General at such time, in such manner, and accompanied by such information as the Assistant Attorney General may reasonably require.
(B) CONTENTS.—Each application submitted pursuant to subparagraph (A) shall—
(i) describe the activities for which assistance under this section is sought; and
(ii) provide such additional assurances as the Assistant Attorney General determines to be essential to ensure compliance with the requirements of this section.

(4) EVALUATION.—The Assistant Attorney General shall enter into a contract with an academic or non-profit organization that has experience in issues related to sex trafficking of minors and evaluation of grant programs to conduct an annual evaluation of each grant made under this section to determine the impact and effectiveness of programs funded with the grant.

(a) MANDATORY EXCLUSION.—An eligible entity that receives a grant under this section that is found to have utilized grant funds for any unauthorized expenditure or otherwise unallowable cost shall not be eligible for any grant funds awarded under the grant for 2 fiscal years following the year in which the unauthorized expenditure or unallowable cost is reported.
"(d) Compliance Requirement.—An eligible entity shall not be eligible to receive a grant under this section if, during the 5 fiscal years before the eligible entity submits an application for the grant, the eligible entity has been found to have violated the terms or conditions of a Government grant program by utilizing grant funds for unauthorized expenditures or otherwise unallowable costs.

"(e) Administrative Cap.—The cost of administering the grants authorized by this section shall not exceed 3 percent of the total amount appropriated to carry out this section.

"(f) Audit Requirement.—For fiscal years 2016 and 2017, the Inspector General of the Department of Justice shall conduct an audit of all 4 eligible entities that receive black grants under this section.

"(g) Match Requirement.—An eligible entity that receives a grant under this section shall provide a non-Federal match in an amount equal to not less than—

(1) 15 percent of the grant during the first year;
(2) 25 percent of the grant during the first renewal period;
(3) 40 percent of the grant during the second renewal period; and
(4) 50 percent of the grant during the third renewal period.

"(h) No Limitation on Section 204 Grants.—An entity that applies for a grant under section 204 is not prohibited from also applying for a grant under this section.

"(i) Authorization of Appropriations.—There are authorized to be appropriated $2,600,000 to the Attorney General for each of the fiscal years 2014 through 2017 to carry out this section.

"(j) GAO Evaluation.—Not later than 30 months after the date of the enactment of this Act, the Comptroller General of the United States shall submit a report to Congress that contains—

(1) an evaluation of the impact of this section in assisting victims of sex trafficking in the jurisdiction of the entity receiving the grant; and
(2) recommendations, if any, regarding any legislative or administrative action the Comptroller General determines appropriate.

(b) Effective Date.—The amendments made by subsection (a) shall be effective during the 4-year period beginning on the date of the enactment of this Act.

SEC. 1242. EXPANDING LOCAL LAW ENFORCEMENT GRANTS FOR INVESTIGATIONS AND PROSECUTIONS OF TRAFFICKING.

Section 304 of the Trafficking Victims Protection Reauthorization Act of 2002 (42 U.S.C. 14044e) is amended—

(1) in subsection (a)(1)—

(A) in subparagraph (A), by striking "United States citizen, or aliens admitted for permanent residence, and"

(B) by redesignating subparagraphs (B), (C), and (D) as subparagraphs (C), (D), and (E), respectively; and

(C) by inserting after paragraph (A) the following:

`(B) to train law enforcement personnel how to identify victims of severe forms of trafficking in persons and related offenses;'; and
S. 47—101

(D) in subparagraph (C), as redesignated, by inserting "and prioritize the investigations and prosecutions of these cases involving minor victims" after "sex acts";
(2) by redesignating subsection (d) as subsection (e);
(3) by inserting after subsection (c) the following:
"(d) No LIMITATION ON SECTION 202 GRANT APPLICATIONS.—An entity that applies for a grant under section 202 is not prohibited from also applying for a grant under this section.;"
(4) in subsection (e), as redesignated, by striking "$30,000,000 for each of the fiscal years 2008 through 2013" and inserting "$10,000,000 for each of the fiscal years 2014 through 2017"; and
(5) by adding at the end the following:
"(f) GAO EVALUATION AND REPORT.—Not later than 30 months after the date of enactment of this Act, the Comptroller General of the United States shall conduct a study of and submit to Congress a report evaluating the impact of this section on—
"(1) the ability of law enforcement personnel to identify victims of severe forms of trafficking in persons and investigate and prosecute cases against offenders, including offenders who engage in the purchasing of commercial sex acts with a minor; and
"(2) recommendations, if any, regarding any legislative or administrative action the Comptroller General determines appropriate to improve the ability described in paragraph (1)."

SEC. 1423. MODEL STATE CRIMINAL LAW PROTECTION FOR CHILD TRAFFICKING VICTIMS AND SURVIVORS.

Section 224(b) of the Trafficking Victims Reauthorization Act of 2000 (22 U.S.C. 7191 note) is amended—
(1) in paragraph (1), by striking "and" at the end;
(2) by redesignating paragraph (2) as paragraph (3); and
(3) by inserting after paragraph (1) the following: "(2) protects children exploited through prostitution by including safe harbor provisions that—
"(A) treat an individual under 18 years of age who has been arrested for engaging in, or attempting to engage in, a sexual act with another person in exchange for monetary compensation as a victim of a severe form of trafficking in persons;
"(B) prohibit the charging or prosecution of an individual described in subparagraph (A) for a prostitution offense;
"(C) require the referral of an individual described in subparagraph (A) to appropriate service providers, including comprehensive service or community-based programs that provide assistance to child victims of commercial sexual exploitation; and
"(D) provide that an individual described in subparagraph (A) shall not be required to prove fraud, force, or coercion in order to receive the protections described under this paragraph;"."
Subtitle C—Authorization of Appropriations

SEC. 1231. ADJUSTMENT OF AUTHORIZATION LEVELS FOR THE TRAFFICKING VICTIMS PROTECTION ACT OF 2000.

The Trafficking Victims Protection Act of 2000 (28 U.S.C. 7101 et seq.) is amended—

(1) in section 112A(b)(4) (28 U.S.C. 7108a(b)(4)—

(A) by striking "$2,000,000" and inserting "$1,000,000"; and

(B) by striking "2008 through 2011" and inserting "2014 through 2017"; and

(2) in section 113 (22 U.S.C. 7110)—

(A) subsection (a)—

(i) by striking "$5,500,000 for each of the fiscal years 2008 through 2011" each place it appears and inserting "$2,000,000 for each of the fiscal years 2014 through 2017";

(ii) by inserting ", including regional trafficking in persons officers, after "for additional personnel"; and

(iii) by striking ", and $3,000 for official reception and representation expenses";

(B) in subsection (b)—

(i) in paragraph (1), by striking "$12,600,000 for each of the fiscal years 2008 through 2011" and inserting "$14,500,000 for each of the fiscal years 2014 through 2017"; and

(ii) in paragraph (2), by striking "to the Secretary of Health and Human Services" and all that follows and inserting "$8,000,000 to the Secretary of Health and Human Services for each of the fiscal years 2014 through 2017";

(C) in subsection (c)(1)—

(i) in subparagraph (A), by striking "2008 through 2011" each place it appears and inserting "2014 through 2017";

(ii) in subparagraph (B) —

(a) by striking "$15,000,000 for fiscal years 2003 and 2004, $10,000,000 for each of the fiscal years 2008 through 2011" and inserting "$10,000,000 for each of the fiscal years 2014 through 2017"; and

(b) by striking "2008 through 2011" and inserting "2014 through 2017"; and

(iii) in subparagraph (C), by striking "2008 through 2011" and inserting "2014 through 2017";

(D) in subsection (d),

(i) by redesignating subparagraphs (A) through (C) as paragraphs (1) through (3), respectively, and moving such paragraphs 2 lines to the left;

(ii) in the paragraph (3), as redesignated, by striking "$10,000,000 for each of the fiscal years 2008 through 2011" and inserting "$11,000,000 for each of the fiscal years 2014 through 2017"; and

(iii) in paragraph (3), as redesignated, by striking "to the Attorney General" and all that follows and
inserting "$11,000,000 to the Attorney General for each of the fiscal years 2014 through 2017.");
(B) in subsection (e):
(i) in paragraph (1), by striking "$15,000,000 for each of the fiscal years 2008 through 2011" and inserting "$7,050,000 for each of the fiscal years 2014 through 2017"; and
(ii) in paragraph (2), by striking "$15,000,000 for each of the fiscal years 2008 through 2011" and inserting "$7,050,000 for each of the fiscal years 2014 through 2017";
(F) in subsection (d), by striking "$10,000,000 for each of the fiscal years 2008 through 2011" and inserting "$6,000,000 for each of the fiscal years 2014 through 2017"; and
(U) in subsection (i), by striking "$18,000,000 for each of the fiscal years 2008 through 2011" and inserting "$16,000,000 for each of the fiscal years 2014 through 2017".

The Trafficking Victims Protection Reauthorization Act of 2005 (Public Law 109-166) is amended—
(1) by striking section 102(b)(4); and
(2) in section 106(c)(2), by striking "$1,000,000 for each of the fiscal years 2008 through 2011" and inserting "$350,000 for each of the fiscal years 2014 through 2017".

Subtitle D—Unaccompanied Alien Children

SEC. 1851. APPROPRIATE CUSTODIAL SETTINGS FOR UNACCOMPANIED MINORS WHO REACH THE AGE OF MAJORITY WHILE IN FEDERAL CUSTODY.

Section 227c(2) of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (8 U.S.C. 1225c(2)) is amended—
(1) by striking "Subject to" and inserting the following:
(A) MINORS IN DEPARTMENT OF HEALTH AND HUMAN SERVICES CUSTODY.—Subject to;
and
(2) by adding at the end the following:
(B) ALIENS TRANSFERRED FROM DEPARTMENT OF HEALTH AND HUMAN SERVICES TO DEPARTMENT OF HOMELAND SECURITY CUSTODY.—If a minor described in subparagraph (A) reaches 18 years of age and is transferred to the custody of the Secretary of Homeland Security, the Secretary shall consider placement in the least restrictive setting available after taking into account the alien's danger to self, danger to the community, and risk of flight. Such aliens shall be eligible to participate in alternative detention programs, utilizing a continuum of alternatives based on the alien's need for supervision, which may include placement of the alien with an individual or an organizational sponsor, or in a supervised group home."
SEC. 1203. APPOINTMENT OF CHILD ADVOCATES FOR UNACCOMPANIED MINORS.

Section 235(c)(6) of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (8 U.S.C. 1225(c)(6)) is amended—

(1) by striking "The Secretary" and inserting the following:

"(A) In general.—The Secretary"; and

(2) by striking "and criminal"; and

(3) by adding at the end the following:

"(B) APPOINTMENT OF CHILD ADVOCATES.—

(i) INITIAL SITES.—Not later than 2 years after the date of the enactment of the Violence Against Women Reauthorization Act of 2013, the Secretary of Health and Human Services shall appoint child advocates at 3 new immigration detention sites to provide independent child advocates for trafficking victims and vulnerable unaccompanied alien children.

(ii) ADDITIONAL SITES.—Not later than 2 years after the date of the enactment of the Violence Against Women Reauthorization Act of 2013, the Secretary shall appoint child advocates at not more than 3 additional immigration detention sites.

(iii) SELECTION OF SITES.—Sites at which child advocate programs will be established under this subparagraph shall be located at immigration detention sites at which more than 60 children are held in immigration custody, and shall be selected sequentially, with priority given to locations with—

(I) the largest number of unaccompanied alien children; and

(II) the most vulnerable populations of unaccompanied children.

(C) RESTRICTIONS.—

(i) ADMINISTRATIVE EXPENSES.—A child advocate program may not use more than 10 percent of the Federal funds received under this section for administrative expenses.

(ii) NONEXCLUSIVITY.—Nothing in this section may be construed to restrict the ability of a child advocate program under this section to apply for or obtain funding from any other source to carry out the programs described in this section.

(iii) CONTRIBUTION OF FUNDS.—A child advocate program selected under this section shall contribute non-Federal funds, either directly or through in-kind contributions, to the costs of the child advocate program in an amount that is not less than 25 percent of the total amount of Federal funds received by the child advocate program under this section. In-kind contributions may not exceed 40 percent of the matching requirement under this clause.

(iv) ANNUAL REPORT TO CONGRESS.—Not later than 1 year after the date of the enactment of the Violence Against Women Reauthorization Act of 2013, and annually thereafter, the Secretary of Health and Human Services shall submit a report describing the activities undertaken
by the Secretary to authorize the appointment of independent Child Advocates for trafficking victims and vulnerable unaccompanied alien children to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives.

"(E) ASSESSMENT OF CHILD ADVOCATE PROGRAM—

(i) in general.—As soon as practicable after the date of the enactment of the Violence Against Women Reauthorization Act of 2013, the Comptroller General of the United States shall conduct a study regarding the effectiveness of the Child Advocate Program operated by the Secretary of Health and Human Services.

(ii) matters to be studied.—In the study required under clause (i), the Comptroller General shall—collect information and analyze the following:

(I) analyze the effectiveness of existing child advocate programs in improving outcomes for trafficking victims and other vulnerable unaccompanied alien children;

(II) evaluate the implementation of child advocate programs in new sites pursuant to subparagraph (B);

(III) evaluate the extent to which eligible trafficking victims and other vulnerable unaccompanied children are receiving child advocate services and assess the possible budgetary implications of increased participation in the program;

(IV) evaluate the barriers to improving outcomes for trafficking victims and other vulnerable unaccompanied children; and

(V) make recommendations on statutory changes to improve the Child Advocate Program in relation to the matters analyzed under subclauses (I) through (IV).

(III) GAO report.—Not later than 2 years after the date of the enactment of this Act, the Comptroller General of the United States shall submit the results of the study required under this subparagraph to—

(i) the Committee on the Judiciary of the Senate;

(II) the Committee on Health, Education, Labor, and Pensions of the Senate;

(III) the Committee on the Judiciary of the House of Representatives; and

(IV) the Committee on Education and the Workforce of the House of Representatives.

"(F) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Secretary and Human Services to carry out this subsection—

(1) $1,000,000 for each of the fiscal years 2014 and 2015; and

(2) $5,000,000 for each of the fiscal years 2016 and 2017."
SEC. 1243. ACCESS TO FEDERAL FOSTER CARE AND UNACCOMPANIED REFUGEE MINOR PROTECTIONS FOR CERTAIN VISA RECEPIENTS.

Section 225(a)(4) of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (8 U.S.C. 1225(a)(4)) is amended—

(1) in subparagraph (A),

(A) by striking "either";

(B) by striking "or who" and inserting a comma; and

(C) by inserting ", or has been granted status under section 101(a)(15)(U) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(U))," before ", shall be eligible";

and


SEC. 1244. GAO STUDY OF THE EFFECTIVENESS OF BORDER SCREENINGS.

(a) Study.——

(1) In general.—The Comptroller General of the United States shall conduct a study examining the effectiveness of screenings conducted by Department of Homeland Security personnel in carrying out section 225(a)(4) of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (8 U.S.C. 1225(a)(4)).

(2) Study.—In carrying out paragraph (1), the Comptroller General shall take into account—

(A) the degree to which Department of Homeland Security personnel are adequately ensuring that—

(i) all children are being screened to determine whether they are described in section 225(a)(3)(A) of the William Wilberforce Trafficking Victims Protection Reauthorization Act;

(ii) appropriate and reliable determinations are being made about whether children are described in section 225(a)(3)(A) of such Act, including determinations of the age of such children;

(iii) children are repatriated in an appropriate manner, consistent with clauses (i) through (iii) of section 225(a)(3)(C) of such Act;

(iv) children are appropriately being permitted to withdraw their applications for admission, in accordance with section 225(a)(3)(B) of such Act;

(v) children are being properly cared for while they are in the custody of the Department of Homeland Security and awaiting repatriation or transfer to the custody of the Secretary of Health and Human Services; and

(vi) children are being transferred to the custody of the Secretary of Health and Human Services in a manner that is consistent with such Act and

(B) the number of such children that have been transferred to the custody of the Department of Health and Human Services, the Federal funds expended to maintain custody of such children, and the Federal benefits available to such children, if any.
3. Access to Department of Homeland Security Operations.—

(A) In General.—Except as provided in subparagraph (B), for the purposes of conducting the study described in subsection (a), the Secretary shall provide the Comptroller General with unrestricted access to all stages of screenings and other interactions between Department of Homeland Security personnel and children encountered by the Comptroller General.

(B) Exception.—The Secretary shall not permit unrestricted access under subparagraph (A) if the Secretary determines that the security of a particular interaction would be threatened by such access.

(b) Report to Congress.—No later than 3 years after the date of the commencement of the study described in subsection (a), the Comptroller General of the United States shall submit a report to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives that contains the Commission’s findings and recommendations.

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.
Bureau of Indian Affairs, Interior

(b) The Superintendent or his/her designated representative must render a written decision within 10 days of the completion of the hearing. The written decision must include:

(1) A written statement covering the evidence relied upon and reasons for the decision; and

(2) The applicant's or recipient's right to appeal the Superintendent or his/her designated representative's decision pursuant to 25 CFR part 2 and request Bureau assistance in preparation of the appeal.

§20.705 Can an applicant or recipient appeal a tribal decision?

Yes, the applicant or recipient must pursue the appeal process applicable to the Public Law 83-638 contract, Public Law 102-477 grant, or Public Law 103-413 self-governance annual funding agreement. If no appeal process exists, then the applicant or recipient must pursue the appeal through the appropriate tribal forum.

PART 23—INDIAN CHILD WELFARE ACT

Subpart A—Purpose, Definitions, and Policy

Sec.
23.1 Purpose.
23.2 Definitions.
23.3 Policy.
23.4 Information collection.

Subpart B—Notice of Involuntary Child Custody Proceedings and Payment for Appointed Counsel in State Courts

23.11 Notice.
23.12 Designated tribal agent for service of notice.
23.13 Payment for appointed counsel in involuntary Indian child custody proceedings in state courts.

Subpart C—Grants to Indian Tribes for Title II Indian Child and Family Service Programs

23.21 Noncompetitive tribal government grants.
23.22 Purpose of tribal government grants.
23.23 Tribal government application contents.

Subpart D—Grants to Off-Reservation Indian Organizations for Title II Indian Child and Family Service Programs

23.31 Competitive off-reservation grant process.
23.32 Purpose of off-reservation grants.
23.33 Competitive off-reservation application contents and application selection criteria.
23.34 Review and decision on off-reservation applications by Area Director.
23.35 Deadline for Central Office action.

Subpart E—General and Uniform Grant Administration Provisions and Requirements

23.41 Uniform grant administration provisions, requirements and applicability.
23.42 Technical assistance.
23.43 Authority for grant approval and execution.
23.44 Grant administration and monitoring.
23.45 Subgrants.
23.46 Financial management, internal and external controls and other assurances.
23.47 Reports and availability of information to Indians.
23.48 Matching shares and agreements.
23.49 Fair and uniform provision of services.
23.50 Service eligibility.
23.51 Grant carry-over authority.
23.52 Grant suspension.
23.53 Cancellation.

Subpart F—Appeals

23.61 Appeals from decision or action by Agency Superintendent, Area Director or Grants Officer.
23.62 Appeals from decision or action by Area Director under subpart D.
23.63 Appeals from decision of official.

Subpart G—Administrative Provisions

23.71 Recordkeeping and information availability.

Subpart H—Assistance to State Courts

23.81 Assistance in identifying witnesses.
23.82 Assistance in identifying language interpreters.
23.83 Assistance in locating biological parents of Indian child after termination of adoption.


Source: 59 FR 2256, Jan. 13, 1994, unless otherwise noted.
Subpart A—Purpose, Definitions, and Policy

§ 23.1 Purpose.


§ 23.2 Definitions.


Assistant Secretary means the Assistant Secretary—Indian Affairs, the Department of the Interior.

Bureau of Indian Affairs (BIA) means the Bureau of Indian Affairs, the Department of the Interior.

Child custody proceeding includes:

1. Foster care placement, which shall mean any action removing an Indian child from his or her parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

2. Termination of parental rights, which shall mean any action resulting in the termination of the parent-child relationship;

3. Preadoptive placement, which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement;

4. Adoptive placement, which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption; and

5. Other tribal placements made in accordance with the placement preferences of the Act, including the temporary or permanent placement of an Indian child in accordance with tribal children’s codes and local tribal custom or tradition;

6. The above terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime in the jurisdiction where the act occurred or upon an award, in a divorce proceeding, of custody to one of the parents.

Consortium means an association or partnership of two or more eligible applicants who enter into an agreement to administer a grant program and to provide services under the grant to Indian residents in a specific geographical area where it is administratively feasible to provide an adequate level of services within the area.

Extended family member shall be as defined by the law or custom of the Indian child’s tribe or, in the absence of such law or custom, shall be a person who has reached the age of 18 and who is the Indian child’s grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent.

Grant means a written agreement between the BIA and the governing body of an Indian tribe or Indian organization wherein the BIA provides funds to the grantee to plan, conduct or administer specific programs, services, or activities and where the administrative and programmatic provisions are specifically delineated.

Grantee means the tribal governing body of an Indian tribe or Board of Directors of an Indian organization responsible for grant administration.

Grants officer means an officially designated officer who administers IOWA grants awarded by the Bureau of Indian Affairs, the Department of the Interior.

Indian means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 7 of the Alaska Native Claims Settlement Act, 43 U.S.C. 1606.

Indian child means any unmarried person who is under age 18 and is either a member of an Indian tribe, or is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.

Indian child’s tribe means the Indian tribe in which an Indian child is a member or is eligible for membership or, in the case of an Indian child who is a member of or is eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts, to be determined in accordance with the BIA’s
“Guidelines for State Courts—Indian Child Custody Proceedings.”

Indian custodian means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody and control has been transferred by the parent of such child.

Indian organization, solely for purposes of eligibility for grants under subpart D of this part, means any legally established group, association, partnership, corporation, or other legal entity which is owned or controlled by Indians, or a majority (51 percent or more) of whose members are Indians.

Indian preference means preference and opportunities for employment and training provided to Indians in the administration of grants in accordance with section 7 (b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 460).

Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians federally recognized as eligible for services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 3 (c) of the Alaska Native Claims Settlement Act, 43 U.S.C. 1602 (c).

Off-reservation ICWA program means an ICWA program administered in accordance with 25 U.S.C. 1903 by an off-reservation Indian organization.

Parent means the biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. The term does not include the unwed father where paternity has not been acknowledged or established.

Reservation means Indian country as defined in 18 U.S.C. 1151 and any lands not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation.

Secretary means the Secretary of the Interior.

Service areas solely for newly recognized or restored Indian tribes without established reservations means those service areas congressionally established by Federal law to be the equivalent of a reservation for the purpose of determining the eligibility of a newly recognized or restored Indian tribe and its members for all Federal services and benefits.

State court means any agent or agency of a state, including the District of Columbia, or any territory or possession of the United States, or any political subdivision empowered by law to terminate parental rights or to make foster care placements, preadoptive placements, or adoptive placements.

Subgrant means a secondary grant that undertakes part of the obligations of the primary grant, and assumes the legal and financial responsibility for the funds awarded and for the performance of the grant-supported activity.

Technical assistance means the provision of oral, written, or other relevant information and assistance to prospective grant applicants in the development of their grant proposals. Technical assistance may include a preliminary review of an application to assist the applicant in identifying the strengths and weaknesses of the proposal, ongoing program planning, design and evaluation, and such other program-specific assistance as is necessary for ongoing grant administration and management.

Title II means title II of Public Law 95-608, the Indian Child Welfare Act of 1978, which authorizes the Secretary to make grants to Indian tribes and off-reservation Indian organizations for the establishment and operation of Indian child and family service programs.

Tribal Court means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

Tribal government means the federally recognized governing body of an Indian tribe.

Value means face, par, or market value, or cost price, whichever is greater.
§ 23.3 Policy.

In enacting the Indian Child Welfare Act of 1978, Pub. L. 95-608, the Congress has declared that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and Indian families by the establishment of minimum Federal standards to prevent the arbitrary removal of Indian children from their families and tribes and to ensure that measures which prevent the breakup of Indian families are followed in child custody proceedings (25 U.S.C. 1903). Indian child and family service programs receiving title II funds and operated by federally recognized Indian tribes and off-reservation Indian organizations shall reflect the unique values of Indian culture and promote the stability and security of Indian children, Indian families and Indian communities. It is the policy of the Bureau of Indian Affairs to emphasize and facilitate the comprehensive design, development and implementation of Indian child and family service programs in coordination with other Federal, state, local, and tribal programs which strengthen and preserve Indian families and Indian tribes.

§ 23.4 Information collection.

(a) The information collection requirements contained in § 23.13 of this part have been approved by the Office of Management and Budget (OMB) under 44 U.S.C. 3501 et seq., and assigned clearance number 1076-0111.

1. This information will be used to determine eligibility for payment of legal fees for indigent Indian parents and Indian custodians, involved in involuntary Indian child custody proceedings in state courts, who are not eligible for legal services through other mechanisms. Response to this request is required to obtain a benefit.

2. Public reporting for this information collection is estimated to average 10 hours per response, including the time for reviewing instructions, gathering and maintaining data, and completing and reviewing the information collection. Direct comments regarding the burden estimate or any aspect of this information collection should be mailed or hand-delivered to the Bureau of Indian Affairs, Information Collection Clearance Officer, Room 336–SIB, 1849 C Street, NW., Washington, DC 20240; and the Office of Information and Regulatory Affairs Paperwork Reduction Project—1976–0111, Office of Management and Budget, Washington, DC 20503.

(b) The information collection requirements contained in §§ 23.21, 23.31, 23.46, 23.47, and 23.71 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 et seq. and assigned clearance number 1076-0131. The information collection requirements under §§ 23.21 and 23.31 are collected in the form of ICWA grant applications from Indian tribes and off-reservation Indian organizations. A response to this request is required to obtain grant funds. The information collection requirements under § 23.46 are collected in compliance with applicable OMB Circulars on Financial Management, Internal and External Controls, and other Fiscal Assurances in accordance with existing Federal grant administration and reporting requirements. The grantee information collection requirements under § 23.47 are collected in the form of quarterly and annual program performance narrative reports and statistical data as required by the grant award document. Pursuant to 35 U.S.C. 151, the information collection requirement under § 23.71 is collected from state courts entering final adoption decrees for any Indian child and is provided to and maintained by the Secretary.

1. Public reporting for the information collection at §§ 23.21 and 23.31 is estimated to average 32 hours per response, including the time for reviewing the grant application instructions, gathering the necessary information and data, and completing the grant application. Public reporting for the information collection at §§ 23.21 and 23.31 is estimated to average a combined total of 16 annual hours per grantee, including the time for gathering the necessary information and data, and completing the required forms and reports. Public reporting for the information collection at § 23.71 is estimated to average 4 hours per response, including the time for obtaining and preparing the final adoption decree for transmission to the Secretary.
§ 23.11 Notice.

(a) In any involuntary proceeding in a state court where the court knows or has reason to know that an Indian child is involved, and where the identity and location of the child’s Indian parents or custodians or tribe is known, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall directly notify the Indian parents, Indian custodians, and the child’s tribe by certified mail with return receipt requested, of the pending proceeding and of their right of intervention. Notice shall include requisite information identified at paragraphs (d)(1) through (4) and (e)(1) through (6) of this section, consistent with the confidentiality requirement in paragraph (e)(7) of this section. Copies of these notices shall be sent to the Secretary and the appropriate Area Director listed in paragraphs (c)(1) through (12) of this section.

(b) If the identity or location of the Indian parents, Indian custodians or the child’s tribe cannot be determined, notice of the pendency of any involuntary child custody proceeding involving an Indian child in a state court shall be sent by certified mail with return receipt requested to the appropriate Area Director listed in paragraphs (c)(1) through (12) of this section. In order to establish tribal identity, it is necessary to provide as much information as is known on the Indian child’s direct lineal ancestors including, but not limited to, the information delineated at paragraph (d)(1) through (4) of this section.

(c)(1) For proceedings in Alabama, Connecticut, Delaware, District of Columbia, Florida, Georgia, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia or any territory or possession of the United States, notices shall be sent to the following address: Eastern Area Director, Bureau of Indian Affairs, 3700 N. Fairfax Drive, Suite 200, Arlington, Virginia 22201.

(c)(2) For proceedings in Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio, or Wisconsin, notices shall be sent to the following address: Minneapolis Area Director, Bureau of Indian Affairs, 321 Second Avenue South, Minneapolis, Minnesota 55401-2241.

(c)(3) For proceedings in Nebraska, North Dakota, or South Dakota, notices shall be sent to the following address: Aberdeen Area Director, Bureau of Indian Affairs, 115 Fourth Avenue, S.E., Aberdeen, South Dakota 57401.

(c)(4) For proceedings in Kansas, Texas (except for notices to the Ysleta del Sur Pueblo of El Paso County, Texas), and the western Oklahoma counties of Alfalfa, Beaver, Butler, Caddo, Canadian, Cimarron, Cleveland, Comanche, Cotton, Custer, Dewey, Ellis, Garfield, Grant, Greer, Harmon, Harper, Jackson, Kay, Kingfisher, Kiowa, Lincoln, Logan, Major, Noble, Oklahoma, Pawnee, Payne, Pottawatomie, Roger Mills, Texas, Tillman, Washita, Woods and Woodward, notices shall be sent to the following address: Anadarko Area Director, Bureau of Indian Affairs, P.O. Box 368, Anadarko, Oklahoma 73005. Notices to the Ysleta del Sur Pueblo of El Paso County, Texas shall be sent to the Albuquerque Area Director at the address listed in paragraph (c)(6) of this section.

(c)(5) For proceedings in Wyoming or Montana (except for notices to the Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana), notices shall be sent to the following address: Billings Area Director, Bureau of Indian Affairs, 315 N. 22nd Street, Billings, Montana 59101. Notices to
§23.11

Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana, shall be sent to the Portland Area Director at the address listed in paragraph (c)(11) of this section.

(9) For proceedings in the Texas counties of El Paso and Hudspeth and proceedings in Colorado or New Mexico (exclusive of notices to the Navajo Tribe from the New Mexico counties listed in paragraph (c)(9) of this section), notices shall be sent to the following address: Albuquerque Area Director, Bureau of Indian Affairs, 615 First Street, P.O. Box 26497, Albuquerque, New Mexico 87125. Notices to the Navajo Tribe shall be sent to the Navajo Area Director at the address listed in paragraph (c)(9) of this section.

(10) For proceedings in Arizona (exclusive of notices to the Navajo Tribe from those counties listed in paragraph (c)(9) of this section), Nevada or Utah (exclusive of San Juan county), notices shall be sent to the following address: Phoenix Area Director, Bureau of Indian Affairs, 1 North First Street, P.O. Box 10, Phoenix, Arizona 85001.

(11) For proceedings in Idaho, Oregon or Washington, notices shall be sent to the following address: Portland Area Director, Bureau of Indian Affairs, 911 NE 11th Avenue, Portland, Oregon 97232. All notices to the Confederated Salish & Kootenai Tribes of the Flathead Reservation, located in the Montana counties of Flathead, Lake, Missoula, and Sanders, shall also be sent to the Portland Area Director.

(12) For proceedings in California or Hawaii, notices shall be sent to the following address: Sacramento Area Director, Bureau of Indian Affairs, Federal Office Building, 2300 Cottage Way, Sacramento, California 95825.

(d) Notice to the appropriate Area Director pursuant to paragraph (b) of this section may be sent by certified mail with return receipt requested or by personal service and shall include the following information, if known:

(1) Name of the Indian child, the child’s birthdate and birthplace.

(2) Name of Indian tribe(s) in which the child is enrolled or may be eligible for enrollment.

(3) All names known, and current and former addresses of the Indian child’s biological mother, biological father, maternal and paternal grandparents and great grandparents or Indian custodians, including maiden, married and former names or aliases; birthdates; places of birth and death; tribal enrollment numbers, and/or other identifying information.
§ 23.13

Bureau of Indian Affairs, Interior

(4) A copy of the petition, complaint or other document by which the proceeding was initiated.

(a) In addition, notice provided to the appropriate Area Director pursuant to paragraphs (b) or (c) of this section shall include the following:

(1) A statement of the absolute right of the biological Indian parents, the child’s Indian custodians and the child’s tribe to intervene in the proceeding.

(2) A statement that if the Indian parent(s) or Indian custodian(s) is (are) unable to afford counsel, and where a state court determines indigency, counsel will be appointed to represent the Indian parent or Indian custodian where authorized by state law.

(3) A statement of the right of the Indian parents, Indian custodians and child’s tribe to be granted, upon request, up to 20 additional days to prepare for the proceedings.

(4) The location, mailing address, and telephone number of the court and all parties notified pursuant to this section.

(5) A statement of the right of the Indian parents, Indian custodians and the child’s tribe to petition the court for transfer of the proceeding to the child’s tribal court pursuant to 25 U.S.C. 1911, absent objection by either parent; Provided, that such transfer shall be subject to declination by the tribal court of said tribe.

(6) A statement of the potential legal consequences of the proceedings on the future custodial and parental rights of the Indian parents or Indian custodians.

(7) A statement that, since child custody proceedings are conducted on a confidential basis, all parties notified shall keep confidential the information contained in the notice concerning the particular proceeding. The notices shall not be handled by anyone not needing the information contained in the notices in order to exercise the tribe’s rights under the Act.

(f) Upon receipt of the notice, the Secretary or his/her designee shall make reasonable documented efforts to locate and notify the child’s tribe and the child’s Indian parents or Indian custodians. The Secretary or his/her designee shall have 15 days, after receipt of the notice from the persons initiating the proceedings, to notify the child’s tribe and Indian parents or Indian custodians and send a copy of the notice to the court. If within the 15-day period the Secretary or his/her designee is unable to verify that the child meets the criteria of an Indian child as defined in 25 U.S.C. 1903, or is unable to locate the Indian parents or Indian custodians, the Secretary or his/her designee shall so inform the court prior to initiation of the proceedings and state how much more time, if any, will be needed to complete the search. The Secretary or his/her designee shall complete all research efforts, even if those efforts cannot be completed before the child custody proceeding begins.

(c) Upon request from a party to an Indian child custody proceeding, the Secretary or his/her designee shall make a reasonable attempt to identify and locate the child’s tribe, Indian parents or Indian custodians to assist the party seeking the information.

§ 23.12 Designated tribal agent for service of notice.

Any Indian tribe entitled to notice pursuant to 25 U.S.C. 1912 may designate by resolution, or by each other form as the tribe’s constitution or current practice requires, an agent for service of notice other than the tribal chairman and send a copy of the designation to the Secretary or his/her designee. The Secretary or his/her designee shall update and publish as necessary the names and addresses of the designated agents in the Federal Register. A current listing of such agents shall be available through the area offices.

§ 23.13 Payment for appointed counsel in involuntary Indian child custody proceedings in state courts.

(a) When a state court appoints counsel for an indigent Indian party in an involuntary Indian child custody proceeding for which the appointment of counsel is not authorized under state law, the court shall send written notice of the appointment to the BIA Area Director designated for that state in §23.11. The notice shall include the following:
(1) Name, address, and telephone number of attorney who has been appointed.
(2) Name and address of client for whom counsel is appointed.
(3) Relationship of client to child.
(4) Name of Indian child's tribe.
(5) Copy of the petition or complaint.
(6) Certification by the court that state law makes no provision for appointment of counsel in such proceedings.
(7) Certification by the court that the Indian client is indigent.
(b) The Area Director shall certify that the client is eligible to have his or her appointed counsel compensated by the BIA unless:
(1) The litigation does not involve a child custody proceeding as defined in 25 U.S.C. 1903(1);
(2) The child who is the subject of the litigation is not an Indian child as defined in 25 U.S.C. 1903(4);
(3) The client is not the Indian child who is the subject of the litigation, the Indian child's parent as defined in 25 U.S.C. 1903(9), nor the child's Indian custodian as defined in 25 U.S.C. 1902(6); or
(4) State law provides for appointment of counsel in such proceedings;
(5) The notice to the Area Director of appointment of counsel is incomplete; or
(6) Funds are not available for the particular fiscal year.
(c) No later than 10 days after receipt of the notice of appointment of counsel, the Area Director shall notify the court, the client, and the attorney in writing whether the client has been certified as eligible to have his or her attorney fees and expenses paid by the BIA. If certification is denied, the notice shall include written reasons for that decision, together with a statement that complies with 25 CFR 2.27 and that informs the applicant that the decision may be appealed to the Assistant Secretary. The Assistant Secretary shall consider appeals under this subsection in accordance with 25 CFR 2.30 through (e). Appeal procedures shall be as set out in part 2 of this chapter.
(d) When determining attorney fees and expenses, the court shall:
(1) Determine the amount of payment due appointed counsel by the same procedures and criteria it uses in determining the fees and expenses to be paid appointed counsel in state juvenile delinquency proceedings.
(e) The Area Director shall authorize the payment of attorney fees and expenses in the amount requested in the voucher approved by the court unless:
(1) The amount of payment due the state-appointed counsel is inconsistent with the fees and expenses specified in 25 CFR 2.13(d)(1); or
(2) The client has not been certified previously as eligible under paragraph (a) of this section; or
(3) The voucher is submitted later than 90 days after completion of the legal action involving a client certified as eligible for payment of legal fees under paragraph (a) of this section.
(f) No later than 15 days after receipt of a payment voucher, the Area Director shall send written notice to the court, the client, and the attorney stating the amount of payment, if any, that has been authorized. If the payment has been denied, or the amount authorized is less than the amount requested in the voucher approved by the court, the notice shall include a written statement of the reasons for the decision together with a statement that complies with 25 CFR 2.27 and that informs the applicant that the decision may be appealed to the Interior Board of Indian Appeals in accordance with 25 CFR 2.4(e); 43 CFR 4.310 through 4.318 and 43 CFR 4.330 through 4.339.
(g) Failure of the Area Director to meet the deadline specified in paragraphs (c) and (f) of this section may be treated as a denial for purposes of appeal under paragraph (f) of this section.
(h) Payment for appointed counsel does not extend to Indian tribes involved in state court child custody proceedings or to Indian families involved in Indian child custody proceedings in tribal courts.
Subpart C—Grants to Indian Tribes for Title II Indian Child and Family Service Programs

§23.21 Noncompetitive tribal government grants.

(a) Grant application information and technical assistance. Information on grant application procedures and related information may be obtained from the appropriate Agency Superintendent or Area Director. Pre-award and ongoing technical assistance to tribal grantees shall be provided in accordance with §23.43 of this part.

(b) Eligibility requirements for tribal governments. The tribal government(s) of any Indian tribe or consortium of tribes may submit a properly documented application for a grant to the appropriate Agency Superintendent or Area Director. A tribe may not submit more than one application for a grant nor be the beneficiary of more than one grant under this subpart.

(1) Through the publication of a FEDERAL REGISTER announcement at the outset of the implementation of the noncompetitive grant award process during which tribal applications will be solicited, the Assistant Secretary will notify eligible tribal applicants under this subpart of the amount of core funds available for their ICWA program. The funding levels will be based on the service area population to be served. Upon the receipt of this notice from the Agency Superintendent or appropriate Area Director, tribal applicants shall submit a completed ICWA application no later than 60 days after the receipt of this notice.

(2) A grant to be awarded under this subpart shall be limited to the tribal governing body(ies) of the tribe(s) to be served by the grant.

(3) For purposes of eligibility for newly recognized or restored Indian tribes without established reservations, such tribes shall be deemed eligible to apply for grants under this subpart to provide ICWA services within those service areas legislatively identified for such tribes.

(4) A grantee under this subpart may make a subgrant to another Indian tribe or an Indian organization subject to the provisions of §23.45.

(c) Revision or amendment of grants. A grantee under this subpart may submit a written request and justification for a post-award grant modification covering material changes to the terms and conditions of the grant, subject to the approval of the grants officer. The request shall include a narrative description of any significant additions, deletions, or changes to the approved program activities or budget in the form of a grant amendment proposal.

(d) Continued annual funding of an ICWA grant under this subpart shall be contingent upon the fulfillment of the requirements delineated at §23.23(c).

(e) Monitoring and program reporting requirements for grantees under this subpart are delineated at §§23.44 and 23.47.

§23.22 Purpose of tribal government grants.

(a) Grants awarded under this subpart are for the establishment and operation of tribally designed Indian child and family service programs. The objective of every Indian child and family service program shall be to prevent the breakup of Indian families and to ensure that the permanent removal of an Indian child from the custody of his or her Indian parent or Indian custodian shall be a last resort. Such child and family service programs may include, but need not be limited to:

(1) A system for licensing or otherwise regulating Indian foster and adoptive homes, such as establishing tribal standards for approval of on-reservation foster or adoptive homes;

(2) The operation and maintenance of facilities for counseling and treatment of Indian families and for the temporary custody of Indian children with the goal of strengthening Indian families and preventing parent-child separations;

(3) Family assistance, including homemaker and home counselors, protective day care and afterschool care, recreational activities, respite care, and employment support services with the goal of strengthening Indian families and contributing to family stability;

(4) Home improvement programs with the primary emphasis on preventing the removal of children due to
§ 23.23

The employment of professional and other trained personnel to assist the tribal court in the disposition of domestic relations and child welfare matters, but not to establish tribal court systems;

(6) Education and training of Indians, including tribal judges and staff, in skills relating to child and family assistance and service programs;

(7) A subsidy program under which Indian adoptive children not eligible for state or BIA subsidy programs may be provided support comparable to that for which they could be eligible as foster children, taking into account the appropriate state standards of support for maintenance and medical needs;

(8) Guidance, legal representation and advice to Indian families involved in tribal, state, or Federal child custody proceedings; and

(9) Other programs designed to meet the intent and purposes of the Act.

(b) Grants may be provided to tribes in the preparation and implementation of child welfare codes within their jurisdiction or pursuant to a tribal-state agreement.

(c) Grantee(s) under this subpart may enhance their capabilities by utilizing ICWA funds as non-Federal matching shares in connection with funds provided under titles IV-B, IV-B and XX of the Social Security Act or other Federal programs which contribute to and promote the intent and purposes of the Act through the provision of comprehensive child and family services in coordination with other tribal, Federal, state, and local resources available for the same purpose.

(d) Program income resulting from the operation of programs under this subpart, such as day care operations, may be retained and used for purposes similar to those for which the grant was awarded.

§ 23.23 Tribal government application contents.

(a) The appropriate Area Director shall, subject to the tribe's fulfillment of the mandatory application requirements and the availability of appropriated funds, make a grant to the tribal governing body of a tribe or consortium of tribes eligible to apply for a grant under this subpart.

(b) The following mandatory tribal application requirements must be submitted to the appropriate Agency Superintendent or Area Director in accordance with the timeframe established in § 23.21(b) of this subpart:

(1) A current tribal resolution requesting a grant by the Indian tribe(s) to be served by the grant. If an applicant is applying for a grant benefiting more than one tribe (consortium), an authorizing resolution from each tribal government to be served must be included. The request must be in the form of a current tribal resolution by the tribal governing body and shall include the following information:

(i) The official name of tribe(s) applying for the grant and who will directly benefit from or receive services from the grant;

(ii) The proposed beginning and ending dates of the grant;

(iii) A provision stating that the resolution will remain in effect for the duration of the program or until the resolution expires or is rescinded; and

(iv) The signature of the authorized representative of the tribal government and the date thereof.

(2) A completed Application for Federal Assistance form, SP-424.

(3) A narrative needs assessment of the social problems or issues affecting the resident Indian population to be served; the geographic area(s) to be served; and estimated number of resident Indian families and/or persons to receive benefits or services from the program.

(4) A comprehensive developmental multi-year plan in narrative form describing what specific services and/or activities will be provided each program year and addressing the above-identified social problems or issues. At a minimum, the plan must include:

(i) The program goals and objectives, stated in measurable terms, to be achieved through the grant;

(ii) A narrative description of how Indian families and communities will benefit from the program; and
(iii) The methodology, including culturally defined approaches, and procedures by which the tribe(s) will accomplish the identified goals and objectives.

(5) An internal monitoring system to measure progress and accomplishments, and to assure that the quality and quantity of actual performance conforms to the requirements of the grant.

(6) A staffing plan that is consistent with the implementation of the above-described program plan of operation and the procedures necessary for the successful delivery of services.

(i) The plan must include proposed key personnel, their qualifications, training or experience relevant to the services to be provided, responsibilities, Indian preference criteria for employment; and position descriptions.

(ii) In accordance with 25 U.S.C. 2901 et seq. (Pub. L. 101-630), Title IV, the Indian Child Protection and Family Violence Prevention Act, grantees shall conduct character and background investigations of those personnel identified in that statute. Grantees must initiate character and background investigations of said personnel prior to their actual employment, and complete the investigations in a timely manner.

(7) A program budget and budget narrative justification submitted on an annual basis for the amount of the award and supported by the proposed plan, appropriate program services and activities for the applicable grant year.

(8) Identification of any consultants and/or subgrantees the applicant proposes to employ; a description of the consultant and/or subgrantees to be rendered; the qualifications and experience in performing the identified services; and the basis for the cost and amount to be paid for such services.

(9) A certification by a licensed accountant that the bookkeeping and accounting procedures which the tribe(s) uses or intends to use meet existing Federal standards for grant management and administration specified at §23.46.

(10) A system for managing property and recordkeeping which complies with subpart D of 43 CFR part 3 implementing the Privacy Act (5 U.S.C. 552a) and with existing Federal requirements for grants at 25 CFR 276.5 and 276.11, including the maintenance and safeguarding of direct service case records on families and/or individuals served by the grant.

(11) A listing of equipment, facilities, and buildings necessary to carry out the grant program. Liability insurance coverage for buildings and their contents is recommended for grantees under this subpart.

(12) Pursuant to the Drug-Free Workplace Act of 1988, tribal programs shall comply with the mandatory Drug-Free Workplace Certification, a regulatory requirement for Federal grant recipients.

(c) Continued annual funding of an ICWA program under this subpart shall be contingent upon the existing grant program receiving a satisfactory program evaluation from the area social services office for the previous year of operation. A copy of this evaluation must be submitted together with an annual budget and budget narrative justification in accordance with paragraph (b)(7) of this section. Minimum standards for receiving a satisfactory evaluation shall include:

(1) The timely submission of all fiscal and programmatic reports;

(2) A narrative program report including work accomplished in accordance with the applicant’s approved multi-year plan and, if applicable, a description of any modification in programs or activities to be funded in the next fiscal year; and

(3) The implementation of mutually determined corrective action measures, if applicable.

Subpart D—Grants to Off-Reservation Indian Organizations for Title II Indian Child and Family Service Programs

§23.31 Competitive off-reservation grant process.

(a) Grant application procedures and related information may be obtained from the Area Director designated at §23.11 for processing ICWA notices for the state in which the applicant is located. Pre-award and ongoing technical assistance of off-reservation Indian organization grantees shall be provided in accordance with §23.42.
§ 23.32 Purpose of off-reservation grants.

The Secretary or his/her designee is authorized to make grants to off-reservation Indian organizations to establish and operate off-reservation Indian child and family service programs for the purpose of stabilizing Indian families and tribes, preventing the breakup of Indian families and, in particular, to ensure that the permanent removal of an Indian child from the custody of his/her Indian parent or Indian custodian shall be a last resort. Child and family service programs may include, but are not limited to:

(a) A system for regulating, maintaining, and supporting Indian foster and adoptive homes, including a subsidy program under which Indian adoptive children may be provided support comparable to that for which they would be eligible as Indian foster children, taking into account the appropriate state standards of support for maintenance and medical needs;

(b) The operation and maintenance of facilities and services for counseling and treatment of Indian families and Indian foster and adoptive children with the goal of strengthening and stabilizing Indian families;

(c) Family assistance (including homemaker and home counseling), protective day care and after-school care, employment support, services, recreational activities, and respite care with the goal of strengthening Indian families and contributing toward family stability; and

(d) Guidance, legal representation, and advice to Indian families involved in state child custody proceedings.

§ 23.33 Competitive off-reservation application contents and application selection criteria.

(a) An application for a competitive multi-year grant under this subpart shall be submitted to the appropriate Area Director prior to or on the announced deadline date published in the Federal Register. The Area Director shall certify the application contents pursuant to § 23.34 and forward the application within five working days to the area review committee, composed

(b) Prior to the beginning of or during the applicable year(s) in which grants for off-reservation programs will be awarded competitively, the Assistant Secretary—Indian Affairs shall publish in the Federal Register an announcement of the grant application process for the year(s), including program priorities or special considerations (if any), applicant eligibility criteria, the required application contents, the amount of available funding and evaluation criteria for off-reservation programs.

(c) Based on the announcement described in paragraph (b) of this section, an off-reservation applicant shall prepare a multi-year developmental application in accordance with § 23.33 of this subpart. To be considered in the area competitive review and scoring process, a complete application must be received by the deadline announced in the Federal Register by the Area Director designated at § 23.11 for processing IOWA notices for the state in which the applicant is located.

(d) Eligibility requirements for off-reservation Indian organizations. The Secretary or his/her designee shall, contingent upon the availability of funds, make a multi-year grant under this subpart for an off-reservation program when officially requested by a resolution of the board of directors of the Indian organization applicant, upon the applicant's fulfillment of the mandatory application requirements and upon the applicant's successful competition pursuant to § 23.32 of this subpart.

(e) A grant under this subpart for an off-reservation Indian organization shall be limited to the board of directors of the Indian organization which will administer the grant.

(f) Continued annual funding of a multi-year grant award to an off-reservation ICWA program under this subpart shall be contingent upon the grantee's fulfillment of the requirements delineated at § 23.33 (c) and (d).

(g) Monitoring and program reporting requirements for grants awarded to off-reservation Indian organizations under this subpart are delineated at §§ 23.44 and 23.47.
of members designated by the Area Director for competitive review and action. Modifications and/or information received after the close of the application period, as announced in the Federal Register, shall not be reviewed or considered by the area review committee in the competitive process.

(b) Mandatory application requirements for Indian organization applicants shall include:

(1) An official request for an ICWA grant program from the organization's board of directors covering the duration of the proposed program;
(2) A completed Application for Federal Assistance form, SF 424;
(3) Written assurances that the organization meets the definition of Indian organization at § 23.2;
(4) A copy of the organization's current Articles of Incorporation for the applicable grant years;
(5) Proof of the organization's non-profit status;
(6) A copy of the organization's IRS tax exemption certificate and IRS employer identification number;
(7) Proof of liability insurance for the applicable grant year; and
(8) Current written assurances that the requirements of Circular A-122 for fiscal management, accounting, and recordkeeping are met.

(9) Pursuant to the Drug-Free Workplace Act of 1988, all grantees under this subpart shall comply with the mandatory Drug-Free Workplace Certification, a regulatory requirement for Federal grant recipients.

(c) Competitive application selection criteria. The Area Director or his/her designated representative shall select those proposals which will in his/her judgment best promote the proposals of the Act. Selection shall be made through the area review committee process in which each application will be scored individually and ranked according to score, taking into consideration the mandatory requirements as specified above and the following selection criteria:

(1) The degree to which the applicant reflects an understanding of the social problems or issues affecting the resident Indian client population which the applicant proposes to serve;
(2) Whether the applicant presents a narrative needs assessment, quantitative data and demographics of the client Indian population to be served;
(3) Estimates of the number of Indian people to receive benefits or services from the program based on available data;
(4) Program goals and objectives to be achieved through the grant;
(5) A comprehensive developmental multi-year narrative plan describing what specific services and/or activities will be provided each program year and addressing the above-identified social problems or issues. At a minimum, the plan must include a narrative description of the program; the program goals and objectives, stated in measurable terms, to be achieved through the grant; and the methodology, including culturally defined approaches, and procedures by which the grantee will accomplish the identified goals and objectives;
(6) An internal monitoring system the grantee will use to measure progress and accomplishments, and to ensure that the quality and quantity of actual performance conforms to the requirements of the grant;
(7) Documentation of the relative accessibility which the Indian population to be served under a specific proposal already has to existing child and family service programs emphasizing the prevention of Indian family breakdowns, such as mandatory state services. Factors to be considered in determining accessibility include:

(i) Cultural barriers;
(ii) Discrimination against Indians;
(iii) Inability of potential Indian clientele to pay for services;
(iv) Technical barriers created by existing public or private programs;
(v) Availability of transportation to existing programs;
(vi) Distance between the Indian community to be served under the proposal and the nearest existing programs;
(vii) Quality of services provided to Indian clientele; and
(viii) Relevance of services provided to specific needs of the Indian clientele.
(8) If the proposed program duplicates existing Federal, state, or local
child and family service programs emphasizing the prevention of Indian family breakups, proper and current documented evidence that repeated attempts to obtain services have been unsuccessful;

(9) Evidence of substantial support from the Indian community or communities to be served, including but not limited to:

(i) Tribal support evidenced by a tribal resolution or cooperative service agreements between the administrative bodies of the affected tribe(s) and the applicant for the duration of the grant period;

(ii) Letters of support from social services organizations familiar with the applicant’s past work experience;

(10) A staffing plan that is consistent with the implementation of the above-described program plan of operation and the procedures necessary for the successful delivery of services. The plan must include proposed key personnel, their qualifications, training or experience relevant to the services to be provided, responsibilities, Indian preference criteria for employment and position descriptions. In accordance with 25 U.S.C. 2301 et seq. (Pub. L. 101–830), Title IV, the Indian Child Protection and Family Violence Prevention Act, grantees shall conduct character and background investigations of those personnel identified in that statute prior to their actual employment;

(11) The reasonableness and relevance of the estimated overall costs of the proposed program or services and their overall relation to the organization’s funding base, activities, and mission;

(12) The degree to which the detailed annual budget and justification for the requested funds are consistent with, and clearly supported by, the proposed plan and by appropriate program services and activities for the applicable grant year;

(13) The applicant’s identification of any consultants and/or subgrantees it proposes to employ; description of the services to be rendered; the qualifications and experience of said personnel, reflecting the requirements for performing the identified services; and the basis for the cost and the amount to be paid for such services;

(14) Certification by a licensed accountant that the bookkeeping and accounting procedures that the applicant uses or intends to use meet existing Federal standards for grant administration and management specified at §23.48;

(15) The compliance of property management and recordkeeping systems with subpart D of 25 CFR part 2 (the Privacy Act, 5 U.S.C. 552a), and with existing Federal requirements for grants at 25 CFR 276.5 and 276.11, including the maintenance and safeguarding of direct service case records on families and/or individuals served by the grant;

(16) A description of the proposed facilities, equipment, and buildings necessary to carry out the grant activities; and

(17) Proof of liability insurance coverage for the applicable grant year(s).

(d) Two or more applications receiving the same competitive score will be prioritized in accordance with announcements made in the FEDERAL REGISTRY pursuant to §23.31 (b) for the applicable year(s).

(e) Continued annual funding of a multi-year grant award to an off-reservation IOWA program under this subpart shall be contingent upon the availability of appropriated funds and upon the existing grant program receiving a satisfactory program evaluation from the area social services office for the previous year of operation. A copy of this evaluation shall be submitted together with an annual audit and budget narrative justification in accordance with paragraph (c)(10) of this section. Minimum standards for receiving a satisfactory evaluation shall include the timely submission of all fiscal and programmatic reports; a narrative program report indicating work accomplished in accordance with the initial approved multi-year plan; and the implementation of mutually determined corrective action measures, if applicable.

§ 23.34 Review and decision on off-reservation applications by Area Director.

(a) Area office certification. Upon receipt of an application for a grant by an off-reservation Indian organization
at the area office, the Area Director shall:
(1) Complete and sign the area office certification form. In completing the area certification form, the Area Director shall assess and certify whether applications contain and meet all the application requirements specified at §23.38. Area Directors shall be responsible for the completion of the area office certification forms for all applications submitted by off-reservation Indian organizations.

(2) Acknowledge receipt of the application to the applicant and advise the applicant of the disposition of the application within 10 days of receipt; and

(3) Transmit all applications within five working days of receipt to the area review committee for competitive review and subsequent approval or disapproval of the applications.

(b) Area office competitive review and decision for off-reservation applications. Upon receipt of an application for an off-reservation grant under this part requiring the approval of the Area Director, the Area Director shall:

(1) Establish and convene an area review committee, chaired by a person qualified by knowledge, training and experience in the delivery of Indian child and family services.

(2) Review the area office certification form required in paragraph (a) of this section.

(3) Review the application in accordance with the competitive review procedures prescribed in §23.33. An application shall not receive approval for funding under the area competitive review and scoring process unless a review of the application determines that it:

(1) Contains all the information required in §23.33 which must be received by the close of the application period. Modifications of the grant application received after the close of the application period shall not be considered in the competitive review process.

(11) Receives at least the established minimum score in an area competitive review using the application selection criteria and scoring process set out in §23.33. The minimum score shall be established by the Central Office prior to each application period and announced in the Federal Register for the applicable grants year(s).

(4) Approve or disapprove the application and promptly notify the applicant in writing of the approval or disapproval of the application. If the application is disapproved, the Area Director shall include in the written notice the specific reasons therefore.

(c) The actual funding amounts for the initial grant year shall be subject to appropriations available nationwide and the continued funding of an approved off-reservation grant application under subpart D of this part shall be subject to available funds received by the respective area office for the applicable grant year. Initial funding decisions and subsequent decisions with respect to funding level amounts for all approved grant applications under this part shall be made by the Area Director.

§23.35 Deadline for Central Office action.
Within 30 days of the receipt of grant reporting forms from the Area Directors identifying approved and disapproved applications pursuant to subpart D of this part and recommended funding levels for approved applications, the Secretary or his/her designee shall process the Area Directors' funding requests.

Subpart E—General and Uniform Grant Administration Provisions and Requirements
§23.41 Uniform grant administration provisions, requirements and applicability.
The general and uniform grant administration provisions and requirements specified at 25 CFR part 278 and under this subpart are applicable to all grants awarded to tribal governments and off-reservation Indian organizations under this part, except to the extent inconsistent with an applicable Federal statute, regulation or OMB circular.

§23.42 Technical assistance.
(a) Pre-award and ongoing technical assistance may be requested by an Indian tribe or off-reservation Indian organization from the appropriate agency
or area office to which the tribe or organization will be submitting an application for funds under subparts C and D of this part. A request for pre-award technical assistance by an off-reservation Indian organization must be received by the Area Director designated at §23.11 for the state in which the applicant is located no later than 10 days prior to the application deadline to assure sufficient time for area response.

(b) Pre-award and ongoing technical assistance may be provided by the appropriate BIA agency or area office for purposes of program planning and design, assistance in establishing internal program monitoring and evaluation criteria for ongoing grant administration and management, and for other appropriate assistance requested.

(c) The area social services staff shall provide technical assistance to grantees upon receipt of an authorized request from the grantee or when review of the grantee's quarterly performance reports shows that:

(1) An ICWA program is yielding results that are or will be detrimental to the welfare of the intended Indian beneficiaries of the program;

(2) A program has substantially failed to implement its goals and objectives;

(3) There are serious irregularities in the fiscal management of the grant; or

(4) The grantee is otherwise deficient in its program performance.

(d) Upon receiving an authorized request from the grantee, the area social services staff and/or grants officer shall provide the necessary technical assistance to arrive at mutually determined corrective action measures and their actual implementation, if necessary, and the timeframes within which said corrective actions will be implemented.

§23.43 Authority for grant approval and execution.

(a) Tribal government programs. The appropriate Agency Superintendent or Area Director may approve a grant application and its subsequent execution under subpart C when the intent, purpose and scope of the application pertains solely to reservations located within the service area jurisdiction of the agency or area office.
Bureau of Indian Affairs, Interior

§ 23.47

(a) Budget control. Actual expenditures must be compared with budgeted amounts for the grant. Financial information must be related to program performance requirements.

(b) Source documentation. Accounting records must be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, grant documents, or other information required by the grantee's financial management system. The Secretary or his/her designee may review the adequacy of the financial management system of an Indian tribe(s) or program or Indian organization applying for a grant under this part.

(c) Pursuant to 18 U.S.C. 641, whoever embezzles, steals, purloins, or knowingly converts to his or her use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or whoever receives, conceals, or retains the same with intent to convert it to his or her use or gain, knowing it to have been embezzled, stolen, purloined, or converted shall be fined not more than $10,000 or imprisoned not more than 30 years, or both; but if the value of such property does not exceed the sum of $100, he or she shall be fined not more than $1,000 or imprisoned not more than one year, or both.

§ 23.47 Reports and availability of information to Indians.

(a) Any tribal government or off-reservation Indian organization receiving a grant under this part shall make general programmatic information and reports concerning that grant available to the Indian people it serves or represents. Access to this information may be requested in writing and shall be made available within 10 days of receipt of the request. Except as required by title IV of Pub. L. 101-630, the Indian Child Protection and Family Violence Prevention Act, grantees shall hold confidential all information obtained from persons receiving services from the program, and shall not release such information without the individual's written consent. Information may be disclosed in a manner which does not identify or lead to the identification of particular individuals.

(b) Grantees shall submit Standard Form 269 or 269A on a quarterly and annual basis to report their status of funds by the dates specified in the grant award document.

(c) Grantees shall furnish and submit the following written quarterly and annual program reports by the dates specified in the award document:

(1) Quarterly and annual statistical and narrative program performance reports which shall include, but need not be limited to, the following:

(i) A summary of actual accomplishments and significant activities as related to program objectives established for the grant period;

(ii) The grantee's evaluation of program performance using the internal monitoring system submitted in their application;

(iii) Reports on all significant ICWA direct service grant activities including but not limited to the following information:

(A) Significant title II activities;

(B) Data reflecting numbers of individuals referred for out-of-home placements, number of individuals benefiting from title II services and types of services provided, and

(C) Information and referral activities;

(iv) Child abuse and neglect statistical reports and related information as required by 25 U.S.C. 2694, Pub. L. 95-570, the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1988;

(v) A summary of problems encountered or reasons for not meeting established objectives;

(vi) Any deliverable or product required in the grant; and

(vii) Additional pertinent information when appropriate.

(2) The BIA may negotiate for the provision of other grant-related reports not previously identified.

(d) Events may occur between scheduled performance reporting dates which have significant impact on the grant-supported activity. In such cases, the grantee must inform the awarding
§ 23.48 Matching shares and agreements.

(a) Grant funds provided to Indian tribes under subpart C of this part may be used as non-Federal matching shares in connection with funds provided under Titles IV-B, IV-E, and XX of the Social Security Act, or other Federal programs which contribute to and promote the purposes of the Act as specified in §§ 23.3 and 23.23 (25 U.S.C. 1931).

(b) Pursuant to 25 U.S.C. 1933, in furtherance of the establishment, operation, and funding of programs funded under subparts C and D of this part, the Secretary may enter into agreements with the Secretary of Health and Human Services. The latter Secretary is authorized by the Act to use funds appropriated for the Department of Health and Human Services for programs similar to those funded under subparts C and D of this part (25 U.S.C. 1931 and 1933) provided that authority to make payment pursuant to such agreements shall be effective only to the extent and in such amounts as may be provided in advance by appropriation acts.

§ 23.49 Fair and uniform provision of services.

(a) Grants awarded under this part shall include provisions assuring compliance with the Indian Civil Rights Act; prohibiting discriminatory distinctions among eligible Indian beneficiaries; and assuring the fair and uniform provision by the grantees of the services and assistance they provide to eligible Indian beneficiaries under such grants. Such procedures must include criteria by which eligible Indian beneficiaries will receive services, record-keeping mechanisms adequate to verify the fairness and uniformity of services in cases of formal complaints, and an explanation of what rights will be afforded an individual pending the resolution of a complaint.

(b) Indian beneficiaries of the services to be rendered under a grant shall be afforded access to administrative or judicial bodies empowered to adjudicate complaints, claims, or grievances brought by such Indian beneficiaries against the grantee arising out of the performance of the grant.

§ 23.50 Service eligibility.

(a) Tribal government Indian child and family service programs. Any person meeting the definition of Indian, Indian child, Indian custodian, or Indian parent of any unmarried person under the age of 18 as defined in § 23.2 is eligible for services provided under 25 U.S.C. 1931 of the Act. Tribal membership status shall be determined by tribal law, ordinance, or custom. The tribe may, under subpart C, extend services to nontribal family members related by marriage to tribal members, provided such services promote the intent and purpose of the Act. The tribe may also, within available resources, extend services under this part to individuals who are members of, or are eligible for membership in other Indian tribes, and who reside within the tribe’s designated service area.

(b) Off-reservation Indian child and family service programs and agreements with the Secretary of Health and Human Services pursuant to 25 U.S.C. 1933. For purposes of eligibility for services provided under 25 U.S.C. 1932 and 1933 of the Act, any person meeting the definition of Indian, Indian child, Indian custodian, or Indian parent of any unmarried person under the age of 18 as defined in § 23.2, or the definition of Indian as defined in 25 U.S.C. 1933(c), shall be eligible for services. Tribal membership status shall be determined by tribal law, ordinance, or custom.

§ 23.51 Grant carry-over authority.

Unless restricted by appropriation, and contingent upon satisfactory program evaluations from the appropriate area or agency office for an existing program, grantees are authorized to carry over unliquidated grant funds which remain at the end of a budget period. Such funds may be carried over for a maximum period of two years beyond the initial grant funding period.
and must be utilized only for the intent, purpose and scope of the original grant. These carry-over grant funds shall not be reprogrammed into other appropriation activities or subactivities. Funds carried over into another fiscal year will be added to the grantee’s new fiscal year funding amount.

§23.52 Grant suspension.

(a) When a grantee has materially failed to comply and remains out of compliance with the terms and conditions of the grant, the grants officer may, after reasonable notice to the grantee and the provision of requested technical assistance, suspend the grant. The notice preceding the suspension shall include the effective date of the suspension, the corrective measures necessary for reinstatement of the grant and, if there is no immediate threat to safety, a reasonable timeframe for corrective action prior to actual suspension.

(b) No obligation incurred by the grantee during the period of suspension shall be allowable under the suspended grant, except that the grants officer may at his/her discretion allow necessary and proper costs which the grantee could not reasonably avoid during the period of suspension if such costs would otherwise be allowable under the applicable cost principles.

(c) Appropriate adjustments to the payments under the suspended grant will be made either by withholding the payments or by not allowing the grantee credit for disbursements which the grantee may make in liquidation of unauthorized obligations the grantee incurs during the period of suspension.

(d) Suspension shall remain in effect until the grantee has taken corrective action to the satisfaction of the grants officer, or given assurances satisfactory to the grants officer that corrective action will be taken, or until the grants officer cancels the grant.

§23.53 Cancellation.

(a) The grants officer may cancel any grant, in whole or in part, at any time before the date of completion whenever it is determined that the grantee has:

(1) Materially failed to comply with the terms and conditions of the grant;

(2) Violated the rights as specified in §23.49 or endangered the health, safety, or welfare of any person; or

(3) Been grossly negligent in, or has mismanaged the handling or use of funds provided under the grant.

(b) When it appears that cancellation of the grant will become necessary, the grants officer shall promptly notify the grantee in writing of this possibility. This written notice shall advise the grantee of the reason for the possible cancellation and the corrective action necessary to avoid cancellation. The grants officer shall also offer, and shall provide, if requested by the grantee, any technical assistance which may be required to effect the corrective action. The grantee shall have 60 days in which to effect this corrective action before the grants officer provides notice of intent to cancel the grant as provided for in paragraph (c) of this section.

(c) Upon deciding to cancel for cause, the grants officer shall promptly notify the grantee in writing of that decision, the reason for the cancellation, and the effective date. The Area Director or his/her designated official shall also provide a hearing for the grantee before cancellation. However, the grants officer may immediately cancel the grant, upon notice to the grantee, if the grants officer determines that continuation of the grant poses an immediate threat to safety. In this event, the Area Director or his/her designated official shall provide a hearing for the grantee within 10 days of the cancellation.

(d) The hearing referred to in paragraph (c) of this section shall be conducted as follows:

(1) The granting affected shall be notified, in writing, at least 10 days before the hearing. The notice should give the date, time, place, and purpose of the hearing.

(2) A written record of the hearing shall be made. The record shall include written statements submitted at the hearing or within five days following the hearing.
§ 23.61 Appeals from decision or action by Agency Superintendent, Area Director, or Grants Officer.

A grantee or prospective applicant may appeal any decision made or action taken by the Agency Superintendent, Area Director, or grants officer under subpart C or E of this part. Such an appeal shall be made to the Assistant Secretary who shall consider the appeal in accordance with 25 CFR 2.30 (c) through (o). Appeal procedures shall be set out in part 2 of this chapter.

§ 23.62 Appeals from decision or action by Area Director under subpart D.

A grantee or applicant may appeal any decision made or action taken by the Area Director under subpart D that is alleged to be in violation of the U.S. Constitution, Federal statutes, or the regulations of this part. These appeals shall be filed with the Interior Board of Indian Appeals in accordance with 25 CFR 2.4 (c), 45 CFR 4.310 through 4.318 and 45 CFR 4.320 through 4.390. However, an applicant may not appeal a score assigned to its application or the amount of grant funds awarded.

§ 23.63 Appeals from inaction of official.

A person or persons whose interests are adversely affected, or whose ability to protect such interests is impeded by the failure of an official to act on a request to the official, may make the official’s inaction the subject of an appeal under part 2 of this chapter.

Subpart G—Administrative Provisions

§ 23.71 Recordkeeping and information availability.

(a) (1) Any state court entering a final decree or adoptive order for any Indian child shall provide the Secretary or his/her designee within 30 days a copy of said decree or order, together with any information necessary to show:

(i) The Indian child’s name, birthdate and tribal affiliation, pursuant to 25 U.S.C. 1951; (ii) Names and addresses of the biological parents and the adoptive parents; and

(iii) Identity of any agency having relevant information relating to said adoptive placement.

(2) To assure and maintain confidentiality where the biological parent(s) have by affidavit requested that their identity remain confidential, a copy of such affidavit shall be provided to the Secretary or his/her designee. Information provided pursuant to 25 U.S.C. 1951(a) is not subject to the Freedom of Information Act (5 U.S.C. 552), as amended. The Secretary or his/her designee shall ensure that the confidentiality of such information is maintained. The address for transmission of information required by 25 U.S.C. 1951(a) is: Chief, Division of Social Services, Bureau of Indian Affairs, 1849 C Street, NW., Mail Stop 316-SIB, Washington, DC 20240. The envelope containing all such information should be marked “Confidential.” This address shall be sent to the highest court of appeal, the Attorney General and the Governor of each state. In some states, a state agency has been designated to be repository for all state court adoption information. Where such a system is operative, that agency may assume reporting responsibilities for the purposes of the Act.

(b) The Division of Social Services, Bureau of Indian Affairs, is authorized to receive all information and to maintain a central file on all state Indian adoptions. This file shall be confidential and only designated persons shall have access to it. Upon the request of an adopted Indian individual over the age of 18, the adoptive or foster parents of an Indian child, or an Indian tribe, the Division of Social Services shall disclose such information as may be necessary for purposes of tribal enrollment or determining any rights or benefits associated with tribal membership, except the names of the biological parents where an affidavit of confidentiality has been filed, to those persons eligible under the Act to request such information. The chief tribal enrollment officer of the BIA is authorized to disclose enrollment information relating to an adopted Indian child where the biological parents have by affidavit
Bureau of Indian Affairs, Interior

requested anonymity. In such cases, the chief tribal enrollment officer shall certify the child's tribe, and, where the information warrants, that the child's parentage and other circumstances entitle the child to enrollment consideration under the criteria established by the tribe.

Subpart H—Assistance to State Courts

§ 23.81 Assistance in identifying witnesses.

Upon the request of a party in an involuntary Indian child custody proceeding or of a court, the Secretary or his/her designee shall assist in identifying qualified expert witnesses. Such requests for assistance shall be sent to the Area Director designated in § 23.11(c). The BIA is not obligated to pay for the services of such expert witnesses.

§ 23.82 Assistance in identifying language interpreters.

Upon the request of a party in an Indian child custody proceeding or of a court, the Secretary or his/her designee shall assist in identifying language interpreters. Such requests for assistance shall be sent to the Area Director designated in § 23.11(c). The BIA is not obligated to pay for the services of such language interpreters.

§ 23.83 Assistance in locating biological parents of Indian child after termination of adoption.

Upon the request of a party in a child placement agency, the court or an Indian tribe, the Secretary or his/her designee shall assist in locating the biological parents or prior Indian custodians of an adopted Indian child whose adoption has been terminated pursuant to 25 U.S.C. 1914. Such requests for assistance should be sent to the Area Director designated in § 23.11(c).

PART 26—JOB PLACEMENT AND TRAINING PROGRAM

Subpart A—General Applicability

Sec.

26.1 What terms do I need to know?
Panel Two – Changing Futures

Sovereign Immunity and Consent

Steven P. McSloy, Esq.
Albany Government Law Review
Conference on
Native American Law in the Modern Era

Thursday, March 10, 2016

Sovereignty, Immunity and Consent

Steven Paul McSloy
Partner
CARTER LEDYARD & MILBURN LLP

2 Wall Street, New York, NY 10005  212-732-3200  Fax: 212-732-3232
Steven Paul McSloy

Steven Paul McSloy is a Partner in the Corporate Department of Carter Ledyard & Milburn LLP in New York City. With over 25 years of experience, he is one of the nation’s leading experts on Native American Law and finance and has worked on some of the largest and most complex financial transactions in Indian Country, acting as lead counsel in financing hotels, casinos, retail outlets, energy projects and municipal buildings on tribal lands.

Steve received his J.D. *cum laude* from Harvard Law School in 1988 and his B.A. *magna cum laude* from New York University, where he was elected to Phi Beta Kappa, in 1985. He has served as the General Counsel of the Oneida Indian Nation of New York and its Turning Stone Casino and has taught American Indian Law at Columbia, N.Y.U., Fordham, Syracuse, Cardozo and St. John’s University Schools of Law and the California Tribal College. He is a member of the bars of the United States Supreme Court, the Oneida Indian Nation of New York and New York State, and is an elected member of the International Masters of Gaming Law

Carter Ledyard & Milburn LLP is a general practice law firm headquartered on Wall Street since 1854.
"You can't tell who's swimming naked until the tide goes out."

- Warren Buffet

The Great Recession exposed a number of things about tribal economic development

And raised some issues for Indian law generally

One generation after IGRA
• Sovereignty generally

• Marshall

• Cohen – Inherent

• Power to decide

• Power to make mistakes

• Waiver is exercise

• Heresy and blasphemy
• Move from geographic to membership sovereignty

• Internal sovereignty strong

• But can look overly internal

• “Tribe is much more than a private, voluntary association” – still?

• Religious examples

• But can disappear into a purely internal thing

• “Do what you want to your own people, but…”
• Sovereign immunity in the courts

• Began accidentally

• Became assumed

• **Kiowa** – Bad facts made good law

• Justice Brennan’s dictum

• Somewhat safe for now – **Bay Mills**, 5-4

• Scalia switched sides from **Kiowa** to **Bay Mills**
"Dodging the Biggest Bullet Since Worcester"

• Sovereign immunity safe for now

• But watch the footnotes:

"We need not consider whether the situation would be different if no alternative remedies were available. We have never, for example, specifically addressed (nor, so far as we are aware, has Congress) whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct. The argument that such cases would present a "special justification" for abandoning precedent is not before us."

- Bay Mills, footnote 8
• Bad cases make bad law

• “Unsuspecting victims”

• **Dollar General** case argued recently

• Seneca Lewiston case

• Insurance coverage cases

• “Arms” race – **Chehalis v. Seneca**

• **Ex parte Young, Maxwell**

• Removal

• Apparent Authority
• Tribes have more sovereign immunity than the United States, New York or France

• How long can that last?

• Protection of the fisc is key
Creating a Consent Regime

". . . the general proposition [is] that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."

- Montana v. U.S. (the "pathmarker")

". . . efforts by a tribe to regulate nonmembers . . . are 'presumptively invalid' [per] Atkinson . . ."

"But as we have emphasized repeatedly in this context, when it comes to tribal regulatory authority, it is not 'in for a penny, in for a Pound.'"

- Plains Commerce Bank v. Long (Roberts, C.J.)

• The Power to Exclude
  – Water Wheel

• Adhesion and Fear
Palsgrafian Sovereignty

"The conceptual clarity of Mr. Chief Justice Marshall's view in Worcester v. Georgia . . . has given way . . ."

"Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law . . . "

" . . . off-reservation activities are within the reach of state law."


• New law being made by the Internetters
  – Otoe(2d Cir.), Jackson (7th Cir.)

• Where is there?

• Adding value or marketing an exemption?
Conclusions

• Count to 5
  - “Let’s be careful out there”

• There is no there there?
  - Law being made on the frontiers will bind all

• “Yes means yes”
  - Get consent in writing, non-adhesionally

• All sovereigns are pragmatic
In the
United States Court of Appeals
For the Seventh Circuit

No. 12-2617

DEBORAH JACKSON, ET AL.,

Plaintiffs-Appellants,

v.

PAYDAY FINANCIAL, LLC, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

No. 1:11-cv-09288 — Charles P. Kocoras, Judge.

ARGUED JANUARY 22, 2013 — DECIDED AUGUST 22, 2014

Before RIPPLE and ROVNER, Circuit Judges, and BARKER, District Judge.∗

RIPPLE, Circuit Judge. Deborah Jackson, Linda Gonnella, and James Binkowski (collectively “the Plaintiffs”) initially brought this action in Illinois state court against Payday Financial, LLC,

* The Honorable Sarah Evans Barker, of the United States District Court for the Southern District of Indiana, sitting by designation.
and other defendant entities owned by, or doing business with, Martin A. Webb, an enrolled member of the Cheyenne River Sioux Tribe and also a named defendant (collectively “the Loan Entities” or “the Defendants”). 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, we ordered a limited remand to the district court for further factual findings concerning (1) whether tribal law was readily available to the litigants and (2) whether 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, we now conclude that the Plaintiffs’ action should not have been dismissed because the arbitral mechanism specified in the agreement is illusory. We also cannot accept the Loan Entities’ alternative argument for upholding the district court’s dismissal: that the loan documents require that any litigation be conducted by a tribal court on the Cheyenne River Sioux Tribe Reservation. As the Supreme Court has explained, most recently in *Plains Com-*
merce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (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. Accordingly, we cannot uphold the district court’s dismissal on this alternative basis.

I

BACKGROUND

A.

The Loan Entities maintain several websites that offer small, high-interest loans to customers. The entire loan transaction is completed online; a potential customer applies for, and agrees to, the loan terms from his computer. Some loan agreements are assigned to CashCall, Inc. ("CashCall"), a California corporation, after they are executed and funds are advanced.

Each plaintiff applied for and received a $2,525 loan through one of the websites belonging to Mr. Webb’s entities. Their loan agreements are nearly identical. Each agreement indicates that the plaintiff will pay approximately 139% in interest each year and that a $2,525 loan will cost approximately $8,392. The loan agreements recite that they are "governed by the Indian Commerce Clause of the Constitution of the United States of America and the laws of the
Cheyenne River Sioux Tribe” and are not subject “to the laws of any state.” Under the terms of the agreement, unless the plaintiff opts out within sixty days, any disputes arising from the agreement “will be resolved by Arbitration, which shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules and the terms of this Agreement.” Arbitration will be conducted by either “(i) a Tribal Elder, or (ii) a panel of three (3) members of the Tribal Council.” The loan agreements further provide that the Loan Entities will pay the filing fee and any fees charged by the arbitrator; the loan consumer does not have to travel to the reservation for arbitration; and the loan consumer may participate in arbitration by phone or videoconference. The agreements with Ms. Jackson and Mr. Binkowski also provide that the contract “is subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation.” Ms. Gonnella’s agreement does not contain similar language.

---

1 R.14-1 at 2; see also id. at 2 (“By executing this Loan Agreement, you, the borrower, hereby acknowledge and consent to be bound to the terms of this Loan Agreement, consent to the sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court, and further agree that no other state or federal law or regulation shall apply to this Loan Agreement, its enforcement or interpretation.”).

2 Id. at 5.

3 Id.

4 Id. at 2 (emphasis added) (bolding in original omitted); see also R.14-8 at 23.
The Plaintiffs executed their loan agreements in 2010 and 2011, received loan funds and made payments on the loans. The record does not indicate whether any of the Plaintiffs have defaulted on the loans.

B.

The Plaintiffs initially brought this action in Illinois state court and alleged violations of Illinois civil and criminal usury statutes as well as the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 et seq. They sought, among other relief, restitution, statutory damages, litigation costs, an injunction precluding the Loan Entities from further lending to Illinois residents, and a declaration that the arbitration clauses contained in the loan agreements are not enforceable. The Loan Entities removed the action to federal court; they then moved to dismiss for improper venue under Federal Rule of Civil Procedure 12(b)(3) on the ground that the agreements required arbitration on the reservation. In reply, the Plaintiffs submitted that the agreements were void and thus the arbitration clauses were unenforceable. They additionally had argued that they executed the loan agreements under duress and that Illinois public policy precluded enforcement of the arbitration clause.

The district court dismissed the case for improper venue. It determined that (1) “the alleged illegality of the Loan Agreements has no bearing on the validity of the forum selection clause”; (2) the Plaintiffs’ agreement to arbitrate was not made under duress; and (3) the Plaintiffs failed to show “that Illinois’ strong public policy in favor of enforcing its usury and
consumer protection laws precludes enforcement of the forum selection provision.”

The Plaintiffs timely appealed. After oral argument, we determined that several factual matters critical to our resolution of the issues on appeal should be addressed in the first instance by the district court:

1. Whether the Cheyenne River Sioux Tribe has applicable tribal law readily available to the public and, if so, under what conditions; and

2. Whether the Cheyenne River Sioux Tribe has an authorized arbitration mechanism available to the parties and whether the arbitrator and method of arbitration required under the contract is actually available.

In the subsequent proceedings before the district court, the parties submitted arguments and documentary evidence in support of their respective positions. After considering this evidence, the district court found that the first inquiry could be answered in the affirmative. The court observed that “[e]ach party was able to secure a copy of the Tribal Law” and therefore concluded that “the law [could] be acquired by reasonable means.” Addressing our second inquiry, the district court concluded that “[i]t is abundantly clear that, on the present
record, the answer to the second question is a resounding no.”

The court noted that, other than its disagreement with the Plaintiffs as to the availability of tribal law, the Plaintiffs’ submission had “fairly describe[d] what the facts show”, included within that submission was the statement that “[t]ribal leadership … have virtually no experience in handling claims made against defendants through private arbitration.”

According to the court, “[t]he intrusion of the Cheyenne River Sioux Tribal Nation into the contractual arbitration provision appear[ed] to be merely an attempt to escape otherwise applicable limits on interest charges. As such, the promise of a meaningful and fairly conducted arbitration [wa]s a sham and an illusion.”

In reaching its conclusion, the district court examined the manner in which an arbitrator had been selected in a similar

8 Id. at 5–6.
9 Id. at 6.
10 R.82 at 8. Although appearing in the Plaintiffs’ statement of relevant facts, the documentation supporting this statement actually was supplied by the Loan Entities. The Loan Entities submitted a letter from a Mediator/Magistrate of the Cheyenne River Sioux Tribe stating that “the governing authority does not authorize Arbitration,” R.83-5 at 2 (Statement of Magistrate Mona R. Demery, Cheyenne River Sioux Tribal Court), and a later, clarifying statement from the same individual stating that “[a]rbitration, as in a contractual agreement, is permissible. However, the Court does not involve itself in the hiring of the arbitrator or setting dates or times for the parties.” R.83-7 at 2.
11 R.95 at 6.

The arbitrator selected in the Inetianbor case was Robert Chasing Hawk, a Tribal Elder. He was personally selected by Martin Webb, the man who owns and operates the Webb entities which are run as a common enterprise. Mr. Webb is himself a member of the Tribe. Although denying any preexisting relationship with either party in the case, Robert Chasing Hawk is the father of Shannon Chasing Hawk. Robert Chasing Hawk has acknowledged that his daughter worked for one of the companies run by Martin Webb.

Mr. Chasing Hawk is not an attorney and has not been admitted to the practice of law either in South Dakota or the court of the Cheyenne River Sioux Tribal Nation. He has not had any training as an arbitrator and the sole basis of his selection was because he was a Tribal Elder.

Black’s Law Dictionary, DeLuxe Fourth Edition, defines “arbitrator” as “a private, disinterested person, chosen by the parties to a disputed question, for the purpose of hearing their contention, and giving judgment between them; to whose decision (award) the litigants submit themselves either voluntarily, or, in some cases, compulsorily by order of a court.” Freedom from bias and prejudice is a
stated criteria of the American Arbitration Association’s Criteria to serve as an arbitrator. Similar is JAM’s Arbitrators Ethics Guidelines which require[] freedom from any appearance of a conflict of interest. Illinois Supreme Court Rule 62 states, in part, that “a judge should respect and comply with the law and should conduct himself or herself at all time[s] in a manner that promotes public confidence in the integrity and impartiality of the judiciary. A judge should not allow the judge’s family, social or other relationships to influence the judge’s judicial conduct or judgment.” It should be no less for an arbitrator.

The selection of Robert Chasing Hawk as the arbitrator in the only comparable case is instructive. No arbitration award could ever stand in the instant case if an arbitrator was similarly selected, nor could it satisfy the concept of a “method of arbitration” available to both parties. The selection of Chasing Hawk in the Inetianbor case was a purely subjective selection by only one of the parties to the arbitration. The process was not “methodized” in any reasonable sense of the word. Webb and Chasing Hawk are members of the same tribe. The Plaintiffs are not. The employment by Webb of the arbitrator’s daughter cannot be ignored. The conduct permitted by the arbitration provisions in this
The case could never satisfy the straightforward definition in Black’s Law Dictionary.\(^{12}\)

The parties submitted supplemental briefs in response to the district court’s findings.\(^{13}\)

II

DISCUSSION

A.

We now turn to the merits of the Plaintiffs’ appeal and begin by examining our jurisdiction and the applicable standard of review.

1.

The jurisdiction of the district court was premised on the Class Action Fairness Act. See 28 U.S.C. § 1332(d). Under the terms of that statute,

The district courts shall have original jurisdiction of any civil action in which the matter in controversy

---

\(^{12}\) R.95 at 3–4.

exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

Id. § 1332(d)(2). Another provision of the Act forbids a district court from exercising jurisdiction if the plaintiff class numbers less than one hundred. See id. § 1332(d)(5).

In this putative class action, the Plaintiffs are all citizens of Illinois who have borrowed money at usurious rates from the Loan Entities. According to the Loan Entities’ removal papers, they have made loans to over one hundred individuals in Illinois.

Turning to the requirements for the Defendants, Mr. Webb is an enrolled member of the Cheyenne River Sioux Tribe and resides on its reservation. Mr. Webb is the sole member of the majority of the named entities.\textsuperscript{14} Mr. Webb’s entities are all

\textsuperscript{14} The named defendants that belong to Mr. Webb are: Payday Financial, LLC; Western Sky Financial, LLC; Great Sky Finance, LLC; Red Stone Financial, LLC; Management Systems, LLC; 24-7 Cash Direct, LLC; Red River Ventures, LLC; High Country Ventures, LLC; and Financial Solutions, LLC.
limited liability companies organized under the laws of South Dakota\(^\text{15}\) and have the same business address in Timber Lake, South Dakota, which is within the reservation. Defendant CashCall is a California corporation that purchases loans from Mr. Webb’s companies, but is otherwise unconnected to Mr. Webb.

The threshold amount in controversy also is met. In an affidavit submitted with the Loan Entities’ removal papers, Mr. Webb states that he “ha[...] knowledge of and ready access to the business records of the [Loan Entities]” and that he examined the data from those records.\(^\text{16}\) According to Mr. Webb’s review of those records, there were “substantially more than 100 individuals” making up the putative class and “the total of all amounts collected from putative class members

---

\(^\text{15}\) The loan agreements state that Western Sky Financial is “authorized by the laws of the Cheyenne River Sioux Tribal Nation.” R.14-1 at 2. In their removal papers, however, the Defendants state that the Loan Entities “were all formed under the laws of South Dakota.” R.1 at 4, ¶10. Similarly, the Plaintiffs’ jurisdictional statement asserts that the lenders controlled by Mr. Webb “are chartered under South Dakota law as limited liability companies” and “are South Dakota Citizens,” Appellants’ Br. 1–2; for their part, the Defendants agreed that the Plaintiffs’ jurisdictional statement was “complete and correct,” Appellees’ Br. 1.

\(^\text{16}\) R.1-1 at 2, ¶5. Our case law requires that the removing defendant, as the proponent of jurisdiction, show “by a preponderance of the evidence facts that suggest the amount-in-controversy requirement is met.” Oshana v. Coca-Cola Co., 472 F.3d 506, 511 (7th Cir. 2006). Here, Mr. Webb’s statement is based both on personal knowledge and also on his review of the applicable records. This evidence is not contested by the Plaintiffs.
and cancellation of all outstanding balances for these same individuals significantly exceeds $5,000,000.”

Our appellate jurisdiction is premised upon 28 U.S.C. § 1291, which gives us jurisdiction over the final decisions of the district courts. It is clear that the decision of the district court granting the Defendants’ motion to dismiss for improper venue was a final decision of that court. Brady v. Sullivan, 893 F.2d 872, 876 n.8 (7th Cir. 1989) (“[W]hen the dismissal is for want of jurisdiction, either of the person or subject matter, or because of improper venue, the judgment is final and may be appealed.” (internal quotation marks omitted)).

2.

The loan agreements’ forum selection clause was the basis for the district court’s dismissal for improper venue. An agreement to arbitrate is a type of forum selection clause. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 630–31 (1985) (treating an arbitration clause in an international agreement as it would other “freely negotiated contractual choice-of-forum provisions”); Sherwood v. Marquette Transp. Co., 587 F.3d 841, 844 (7th Cir. 2009) (“An arbitration agreement is a specialized forum-selection clause.”).

17 R.1–1 at 2, ¶7.

18 The loan agreements require that all “[d]ispute[s] … be resolved by Arbitration, which shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules and the terms of this Agreement.” R.14-1 at 5.
The parties agree that our review of the enforceability of a forum selection clause is de novo. See Cont’l Ins. Co. v. M/V Orsula, 354 F.3d 603, 607 (7th Cir. 2003). They disagree, however, as to whether the Plaintiffs are entitled to inferences in their favor. In Faulkenberg v. CB Tax Franchise Systems, LP, 637 F.3d 801, 806 (7th Cir. 2011), we stated that in reviewing a district court’s grant of a Rule 12(b)(3) motion, reasonable inferences from the facts should be construed in the plaintiffs’ favor. This approach is consistent with that of other courts of appeals and commentators.\textsuperscript{19}

\textsuperscript{19} See Petersen v. Boeing Co., 715 F.3d 276, 279 (9th Cir. 2013) (per curiam) (stating that, in reviewing a Rule 12(b)(3) motion, a court “must draw all reasonable inferences in favor of the non-moving party and resolve all factual conflicts in favor of the nonmoving party” (internal quotation marks omitted)); TradeComet.com LLC v. Google, Inc., 647 F.3d 472, 475 (2d Cir. 2011) (“We review de novo a district court’s dismissal of a complaint pursuant to Rules 12(b)(1) and 12(b)(3), viewing all facts in the light most favorable to the non-moving party.”); Ambraco, Inc. v. Bossclip B.V., 570 F.3d 233, 237 (5th Cir. 2009) (“Our de novo review under either Rule 12(b)(1) or Rule 12(b)(3) requires us to view all the facts in a light most favorable to the plaintiff.” (internal quotation marks omitted)); 5B Charles Alan Wright, et al., Federal Practice & Procedure § 1352, at 324 (3d ed. 2004).

The Loan Entities argue that Faulkenberg v. CB Tax Franchise Systems, LP, 637 F.3d 801 (7th Cir. 2011), is “an outlier” and note that “Faulkenberg itself cites Kochert v. Adagen Med. Int’l, Inc. for the standard of review, but Kochert makes no mention of drawing facts or inferences in any party’s favor. 491 F.3d 674, 677 (7th Cir. 2007).” Appellees’ Br. 8. We are not persuaded. Faulkenberg cites Kochert for the proposition that a district court’s dismissal under Rule 12(b)(3) is subject to de novo review; the fact that Kochert does not mention inferences in the non-moving party’s favor does not render Faulkenberg’s statement an outlier, as demonstrated by the number of cases from our sister circuits that clearly state this proposition.
B.

As the Supreme Court noted in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010), the Federal Arbitration Act ("FAA") reflects the overarching principle that arbitration is a matter of contract. As a general rule, courts must "rigorously enforce" arbitration agreements according to their terms. *Am. Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)). Having determined that our jurisdiction is secure and having examined the standard of review question, we now turn to an examination of the validity of the forum selection clause, the contractual provision at issue in this case.

1.

In addressing this question, we first must identify the law that governs the validity of the arbitration clause, which, as we have noted, is a specialized forum selection clause. Here, the district court’s jurisdiction over the Plaintiffs’ claims is based on the parties’ diversity of citizenship.\(^{20}\) As a general rule, “[i]n diversity cases, we look to the substantive law of the state in which the district court sits, *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).\(^{20}\)

\(^{20}\) The Class Action Fairness Act requires “minimal diversity,” see, e.g., 28 U.S.C. § 1332(d)(2)(A) (permitting district courts to exercise jurisdiction over class actions in which “any member of a class of plaintiffs is a citizen of a State different from any defendant”); it therefore does not run afoul of the constitutional diversity requirement, see *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 531 (1967) (“Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens.”).

When applied to the circumstances here, however, we are without clear guidance from the Supreme Court: It has not yet decided “the Erie issue of which law governs when,” as here, “a federal court, sitting in diversity, evaluates a forum selection clause in the absence of a controlling federal statute.” Wong v. PartyGaming Ltd., 589 F.3d 821, 826 (6th Cir. 2009). At present, the majority of federal circuits hold “that the enforceability of a forum selection clause implicates federal procedure and should therefore be governed by federal law.” Id. at 827 & n.5 (collecting cases); see also 14D Charles Alan Wright, et al., Federal Practice & Procedure § 3803.1, at 107–12 (4th ed. 2014). We have taken a different approach. In Abbott Laboratories v. Takeda Pharmaceutical Co., 476 F.3d 421 (7th Cir. 2007), we stated:

21 See, e.g., Doe 1 v. AOL LLC, 552 F.3d 1077, 1081 (9th Cir. 2009) (“We apply federal law to the interpretation of the forum selection clause.”); Phillips v. Audio Active Ltd., 494 F.3d 378, 384 (2d Cir. 2007) (“[T]he rule set out in M/S Bremen [v. Zapata Off-Shore Co., 407 U.S. 1 (1972),] applies to the question of enforceability of an apparently governing forum selection clause, irrespective of whether a claim arises under federal or state law.”); P & S Bus. Machs. v. Canon USA, Inc., 331 F.3d 804, 807 (11th Cir. 2003) (“Consideration of whether to enforce a forum selection clause in diversity suit is governed by federal law ….”). Most of these cases rest, at bottom, on the premise that “[q]uestions of venue and the enforcement of forum selection clauses are essentially procedural, rather than substantive, in nature.” Jones v. Weibrecht, 901 F.2d 17, 19 (2d Cir. 1990).
Simplicity argues for determining the validity and meaning of a forum selection clause, in a case in which interests other than those of the parties will not be significantly affected by the choice of which law is to control, by reference to the law of the jurisdiction whose law governs the rest of the contract in which the clause appears, rather than making the court apply two different bodies of law in the same case.

Id. at 423 (citations omitted). In contracts containing a choice of law clause, therefore, the law designated in the choice of law clause would be used to determine the validity of the forum selection clause. See id.; IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union, 512 F.3d 989, 991 (7th Cir. 2008) (“Abbott Laboratories … held that the validity of a forum-selection clause depends on the law of the jurisdiction whose rules will govern the rest of the dispute.”).

Applying the rule in Abbott Laboratories, we look to the choice of law clause in the loan agreements, which provides that the agreements are “governed by the Indian Commerce Clause of the Constitution of the United States of America and the laws of the Cheyenne River Sioux Tribe.” Assuming the validity of this choice of law provision, the Defendants have

---

22 R.14-1 at 4; see also id. at 2.

23 Both the Plaintiffs and the Attorney General of Illinois maintain that the choice of law provision and the forum selection clause work in tandem to create an unconscionable result. See Appellants’ Br. 13, 25; Illinois Att’y Gen. (continued...
Br. 22. We agree that a more-than-colorable argument can be made that the loan agreements’ choice of law clause should not be enforced and that Illinois law ought to govern the parties’ dispute.

The courts of Illinois will respect a choice of law clause if the contract is valid and if the law chosen is not contrary to Illinois public policy. *Thomas v. Guardsmark*, 381 F.3d 701, 705 (7th Cir. 2004). Here, the Plaintiffs and amici maintain that several provisions of the loan agreements violate Illinois public policy. First, the Attorney General argues that “Illinois has a strong public policy against enforcing provisions requiring plaintiffs to adjudicate claims in a distant, inconvenient forum where, as in this case, the clause is embedded in contracts ‘involving unsophisticated consumers in small transactions in the marketplace without any real opportunity to consider [whether to accept the clause].’” Illinois Att’y Gen. Br. 12 (alteration in original) (quoting *IFC Credit Corp. v. Rieker Shoe Corp.*, 881 N.E.2d 382, 394 (Ill. App. Ct. 2007)); see also infra pp. 22–26. The Plaintiffs maintain that the contracts violate Illinois public policy against usury because they exceed the allowable interest rate under state law. See 815 ILCS 205/4(1) (stating that “in all written contracts it shall be lawful for the parties to stipulate or agree [to] 9% per annum, or any less sum of interest”). Small consumer loans, however, are exempted from this requirement, to the extent that they comply with the State’s Consumer Installment Loan Act. See id. (“It is lawful to receive or to contract to receive and collect interest and charges as authorized by this Act and as authorized by the Consumer Installment Loan Act … “).

The Defendants seize on this exception and note that, when the Plaintiffs entered into the loan agreements, “Illinois law imposed no cap on the interest rate allowed for small consumer loans,” and, when the General Assembly amended the law, it imposed a maximum rate of ninety-nine percent. Reply Brief of Defendants-Appellees to Briefs of Amici Curiae [hereinafter Defendants’ Reply Br.] 21. Defendants cannot invoke this exception, however, because they are not licensed providers as required by 205 ILCS 670/1; moreover, they do not maintain that they otherwise have complied with the consumer-protection provisions of the Consumer (continued...
informed us in their supplemental briefing that they “have been unable to locate tribal precedent addressing forum selection clauses.” In such circumstances, they note, tribal courts borrow from “federal law to stand in or amplify tribal law where necessary.” We therefore turn to the federal guidelines for determining the validity of a forum selection clause.

We have held that “[t]he presumptive validity of a forum selection clause can be overcome if the resisting party can show it is ‘unreasonable under the circumstances.’” *Bonny v. Soc’y of Lloyd’s*, 3 F.3d 156, 160 (7th Cir. 1993) (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972)). Relying on the Court’s decisions in *M/S Bremen* and *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), we have identified three sets of circumstances that will render a forum selection clause “unreasonable”:

(...continued)

23 Installment Loan Act, *see, e.g.*, 205 ILCS 670/14 (prohibiting a lender from “pledg[ing], hypothecat[ing] or sell[ing] a note entered into under the provisions of this Act by an obligor except to another licensee under this Act”). The Loan Entities tacitly admit that the licensure requirements may call the contract into question, but maintain that “[w]hether the licensure requirements cited by Plaintiffs apply here must still be decided] [in the forum the Parties agreed to.” Appellees’ Br. 19. n.12. We need not decide the question of what law governs the validity and interpretation of the loan agreements, however, because whether federal, tribal, or Illinois law applies, the same result obtains. *See infra* pp. 19–26.

24 Defendants’ Reply Br. 22.

25 *Id.* (internal quotation marks omitted).
(1) if their incorporation into the contract was the result of fraud, undue influence or overweening bargaining power; (2) if the selected forum is so “gravely difficult and inconvenient that [the complaining party] will for all practical purposes be deprived of its day in court[];” or (3) if enforcement of the clauses would contravene a strong public policy of the forum in which the suit is brought, declared by statute or judicial decision.

Bonny, 3 F.3d at 160 (first alteration in original) (citations omitted) (quoting M/S Bremen, 407 U.S. at 18).

Applying this standard, we believe enforcement of the forum selection clause contained in the loan agreements is unreasonable. The loan agreements specify that disputes arising from the agreement “will be resolved by Arbitration, which shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules and the terms of this Agreement.” 26 Arbitration will be conducted by “either (i) a Tribal Elder, or (ii) a panel of three (3) members of the Tribal Council.” 27 The record clearly establishes, however, that such a forum does not exist: The Cheyenne River Sioux Tribe “does not authorize Arbitration,” 28 it “does not involve itself in the hiring of ...
arbitrator[s],” and it does not have consumer dispute rules. We have no hesitation concluding that an illusory forum is unreasonable under *M/S Bremen*.

---

29 R.83-7 at 2.

30 Defendants’ Reply Br. 4 (“Nor does it matter that the CRST does not have any ‘consumer dispute rules,’ which the Agreements presuppose.”).


In their supplemental submission, the Defendants try to characterize the Illinois Attorney General’s amicus brief as stating that “under federal law (and thus tribal) law, the forum selection clause is valid.” Defendants’ Reply Br. 23. The Defendants misread the Attorney General’s submission. In her brief to this court, the Attorney General reviewed our decision in *IFC Credit Corp. v. Aliano Brothers General Contractors*, 437 F.3d 606 (7th Cir. 2006), which noted that

“Illinois law on validity is more lenient toward the [party challenging the forum selection clause] than the federal law when there is significant inequality of size or commercial sophistication between the parties, especially if the transaction is so small that the unsophisticated party might not be expected to be careful about reading boilerplate provisions that would come into play only in the event of a lawsuit, normally a remote possibility.”

Illinois Att’y Gen. Br. 13 (alteration in original) (quoting *IFC Credit Corp.*, 437 F.3d at 611). The Attorney General then proceeds to argue that, under Illinois law, the choice of forum provision is invalid. The Attorney General does not analyze the choice of forum provision under federal law, nor does (continued...)

Under Illinois law, “[a] forum selection clause in a contract is *prima facie* valid and should be enforced unless the opposing party shows that enforcement would be unreasonable under the circumstances.” *IFC Credit Corp. v. Rieker Shoe Corp.*, 881 N.E.2d 382, 389 (Ill. App. Ct. 2007). This is true, however, only of “agreement[s] reached through arm’s-length negotiation between experienced and sophisticated business people”; “a forum selection clause contained in boilerplate language indicates unequal bargaining power, and the significance of the provision is greatly reduced.” *Id.*

In an effort to make more concrete the standard of reasonableness articulated in *M/S Bremen*, Illinois courts typically have looked to six factors:

(1) the law that governs the formation and construction of the contract; (2) the residency of the parties; (3) the place of execution and/or performance of the contract; (4) the location of the parties and their witnesses; (5) the inconvenience to the parties of any

---

31 (...continued)

she make any predictions about what the outcome of such an analysis might be.

32 *See supra* note 23.
particular location; and (6) whether the clause was equally bargained for.

Id. at 389–90 (citing Dace Int’l, Inc. v. Apple Computer, Inc., 655 N.E.2d 974, 977 (Ill. App. Ct. 1995)). Even assuming that tribal law governs the formation and construction of the contract, another key element weighs against enforcement of the clause, namely that the clause was not the product of equal bargaining: It imposes on unsophisticated consumers a nonexistent forum for resolution of disputes in a location that is remote and inconvenient.

Although helpful in evaluating the mine-run of forum selection clauses that a court may encounter, these criteria are ill-suited for evaluating the forum designated in these particular loan agreements. The factors set forth in *IFC Credit Corp.* presuppose that the designated forum exists and is available to resolve the underlying dispute. Such is not the case here.

We do find helpful, however, the closely allied yet distinct concept of unconscionability. See *Phoenix Ins. Co. v. Rosen*, 949 N.E.2d 639, 647 (Ill. 2011). Under Illinois law, a contractual provision may be unconscionable on either procedural or substantive grounds. *Razor v. Hyundai Motor Am.*, 854 N.E.2d 607, 622 (Ill. 2006). “Procedural unconscionability refers to a situation where a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it, and also takes into account a lack of bargaining power.” Id. “Factors to be considered in determining whether an agreement is procedurally unconscionable include whether each party had the opportunity to understand the terms of the contract, whether important terms were
hidden in a maze of fine print, and all of the circumstances surrounding the formation of the contract.” Phoenix Ins. Co., 949 N.E.2d at 647 (internal quotation marks omitted). Substantive unconscionability, by contrast,

concerns the actual terms of the contract and examines the relative fairness of the obligations assumed. … Indicative of substantive unconscionability are contract terms so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in the obligations and rights imposed by the bargain, and significant cost-price disparity.

Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 267 (Ill. 2006) (internal quotation marks omitted). Like other contractual provisions, forum selection clauses—even those designating arbitral fora—are not immune from the general principle that unconscionable contractual provisions are invalid.33

---

33 Potiyevskiy v. TM Transp., Inc., No. 1-13-1864, 2013 WL 6199949, at *7–10 (Ill. App. Ct. Nov. 25, 2013) (holding that arbitration agreement in employment contract was substantively unconscionable because it required a plaintiff to challenge individually each biweekly pay period during which an allegedly improper deduction occurred, it required arbitration of disputes in Illinois despite an employee’s state of residence, and the arbitration fees made claims cost-prohibitive); Timmerman v. Grain Exch., LLC, 915 N.E.2d 113, 120 (Ill. App. Ct. 2009) (holding that arbitration provision was procedurally unconscionable where “[t]he contracts themselves made no direct mention of arbitration,” and the rules that incorporated the arbitration provision “were not set forth in the contracts, nor had they been provided to or made available to the plaintiffs prior to their entering into the contracts”).
The choice of forum provision at issue here is both procedurally and substantively unconscionable. Turning first to procedural unconscionability, although the district court held on remand that the substantive commercial law of the Cheyenne River Sioux Tribe was reasonably ascertainable, it did not reach this conclusion with respect to tribal rules for conducting arbitrations. Indeed, the record establishes that such procedures do not exist. The Tribe has neither a set of procedures for the selection of arbitrators nor one for the conduct of arbitral proceedings. Consequently, it was not possible for the Plaintiffs to ascertain the dispute resolution processes and rules to which they were agreeing. Moreover, even if the described arbitral forum were functional and its rules ascertainable, we agree with the Federal Trade Commission that “[t]he inconsistent language in the loan contracts, specifying both exclusive Tribal Court jurisdiction and exclusive tribal arbitration without reconciling those provisions, also ma[de] it difficult for borrowers to understand exactly what form of dispute resolution they [we]re agreeing to.”\textsuperscript{34} Finally, the Loan Entities’ claims concerning the scope of tribal jurisdiction, as well as their invocation of an irrelevant constitutional provision, “may [have] induce[d] [the Plaintiffs] to believe, mistakenly, that they ha[d] no choice but to accede to resolution of their disputes on the Reservation.”\textsuperscript{35}

With respect to substantive unconscionability, the dispute-resolution mechanism set forth in the loan

\textsuperscript{34} FTC Br. 27.

\textsuperscript{35} \textit{Id.}
agreements—“conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules”—did not exist. As the district court “resounding[ly]” concluded, there simply was no prospect “of a meaningful and fairly conducted arbitration”; instead, this aspect of the loan agreements “[wa]s a sham and an illusion.”

36 R.14-1 at 5.

37 R.95 at 6. Our conclusion would not change if we were to apply tribal law as opposed to Illinois law, as urged by the Defendants. According to the Defendants, the courts of the Cheyenne River Sioux Tribe would employ “‘traditional contractual principles,’ including the Restatement,” to determine if the forum selection provision were unconscionable. Defendants’ Reply Br. 9. They explain that the Restatement, unlike Illinois law, requires a showing of both procedural and substantive unconscionability. However, as we already have demonstrated, the forum selection clause here is both substantively and procedurally unconscionable.

We note that other courts have refused to honor agreements to arbitrate, where the rules are inherently biased or are not formulated in good faith. See, e.g., Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 940 (4th Cir. 1999) (“By creating a sham system unworthy even of the name of arbitration, Hooters completely failed in performing its contractual duty.”). Indeed, we have refused to enforce an arbitration agreement where the obligation was so one-sided as to make any genuine obligation illusory. Cf. Penn v. Ryan’s Family Steak Houses, Inc., 269 F.3d 753, 756, 758–61 (7th Cir. 2001) (observing that the agreement to arbitrate is “hopelessly vague and uncertain as to the obligation EDS has undertaken” and concluding that, “[f]or all practical purposes, EDS’s promise under this contract makes performance entirely optional with the promisor” (emphasis added) (internal quotation marks omitted)).
The Loan Entities nevertheless maintain that these state-law-based shortcomings are irrelevant because Section 2 of the Federal Arbitration Act “preempts arbitrator bias defenses because such defenses are not applicable to all contracts.” They point out that section 2 of the FAA provides that arbitration clauses are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (emphasis added). They then submit that, because arbitrator bias is a “defense[] that appl[ies] only to arbitration or that derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue,” AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746 (2011) (emphasis added), it is not applicable to “any contract” and is therefore preempted.

We cannot accept this argument. The arbitration clause here is void not simply because of a strong possibility of arbitrator bias, but because it provides that a decision is to be made under a process that is a sham from stem to stern. Although the contract language contemplates a process conducted under the watchful eye of a legitimate governing tribal body, a proceeding subject to such oversight simply is not a possibility. The arbitrator is chosen in a manner to ensure partiality, but, beyond this infirmity, the Tribe has no rules for the conduct of the procedure. It hardly frustrates FAA provisions to void an arbitration clause on the ground that it contemplates a proceeding for which the entity responsible for conducting the proceeding has no rules, guidelines, or guarantees of fairness.

38 Defendants’ Reply Br. 5.
See Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 940 (4th Cir. 1999) (“By creating a sham system unworthy even of the name of arbitration, Hooters completely failed in performing its contractual duty.”); cf. Penn v. Ryan’s Family Steak Houses, Inc., 269 F.3d 753, 756, 758–61 (7th Cir. 2001) (refusing to enforce an arbitration clause that is “hopelessly vague and uncertain as to the obligation EDS has undertaken” because it, “[f]or all practical purposes, … makes performance entirely optional with the promisor” (internal quotation marks omitted)).

39 The Loan Entities also make the claim that, “[b]ecause Illinois enforces adhesion contracts despite unconscionability claims, it may not use [the] unconscionability doctrine to void arbitration provisions in those contracts.” Defendants Reply Br. 6 (citing Koveleskie v. SBC Capital Mkts., Inc., 167 F.3d 361, 366–67 (7th Cir. 1999)). Koveleskie does not support such a sweeping conclusion. In Koveleskie, we commented that Illinois courts do not consider disparity of bargaining power, standing alone, as a reason to invalidate contracts. Consequently, “the disparity in the size of the parties entering into the agreement … without some wrongful use of that power, is not enough to render an arbitration agreement unenforceable.” 167 F.3d at 367 (alteration in original) (internal quotation marks omitted). Here, as we have discussed, the Loan Entities used the disparity in bargaining power to impose on the Plaintiffs a dispute-resolution mechanism that does not exist.

We also cannot accept the Loan Entities’ suggestion that the FAA preempts Illinois’s rules on unconscionability with respect to the forum selection clause because they have a “‘disproportionate impact on arbitration agreements.’” Defendants’ Reply Br. 16 (quoting AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1747 (2011)). According to the Loan Entities, subjecting arbitration agreements to unconscionability rules for forum selection clauses “would give States free rein to gut the FAA by labeling their policy applicable to ‘forum selection clauses’ rather than arbitration provisions.” Id. at 17. However, because the Supreme Court has (continued...)
The Loan Entities also contend that section 5 of the FAA prevents our voiding the arbitration clause. That section provides, in relevant part, that, “if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators[,] … the court shall designate and appoint an arbitrator or arbitrators … who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein.” 9 U.S.C. § 5.

Like the Loan Entities’ earlier argument, this submission assumes that the arbitration provision’s only infirmity is the disability of a particular arbitrator or class of arbitrators. Here, however, the likelihood of a biased arbitrator is but the tip of the iceberg. Although the arbitration provision contemplates the involvement and supervision of the Cheyenne River Sioux Tribe, the record establishes that the Tribe does not undertake such activity. Furthermore, there are no rules in place for such an arbitration. Under these circumstances, the court cannot save the arbitral process simply by substituting an arbitrator.

This case is therefore distinctly different from the situation that we faced in Green v. U.S. Cash Advance Illinois, LLC, 724 F.3d 787 (7th Cir. 2013). In Green, a lender moved to dismiss a

---

(...continued)
treated arbitration provisions as forum selection provisions, see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 630–31 (1985) (treating an arbitration clause in an international agreement as it would other “freely negotiated contractual choice-of-forum provisions”), we perceive no impediments in allowing states to apply their generally applicable unconscionability rules to arbitration provisions in the same manner they would apply those rules to clauses designating non-arbitral fora.
plaintiff’s claims under the Truth in Lending Act on the
ground that the lending contract required submission of
disputes to “arbitration by one arbitrator by and under the
Code of Procedure of the National Arbitration Forum.” Id. at
788 (internal quotation marks omitted). The National Arbitra-
tion Forum, however, had stopped taking consumer cases for
arbitrations. The district court, therefore, denied the motion to
dismiss on the ground that “the identity of the Forum as the
arbitrator [wa]s ‘an integral part of the agreement’” and that
the arbitration provision was therefore void. Id. at 789. We
reversed. We noted that the language of the agreement called
for the arbitration to be conducted in accordance with the
National Arbitration Forum’s procedures, not necessarily
under its direct auspices. The district court, therefore, could
invoke section 5 of the FAA to appoint an arbitrator, who then
could “resolve this dispute using the procedures in the
National Arbitration Forum’s Code of Procedure.” Id. at 793.

In Green, we noted that, if the particular arbitration clause
before us had been shorn of all detail as to the number of
arbitrators, the identity of the arbitrators or the rules that the
arbitrators were to employ, the mere existence of the arbitra-
tion clause would have made it clear that the parties still
would have preferred to submit their dispute to arbitration. Id.
at 792–93.

Although such mutuality of intent might have been
apparent in the contractual relationship in Green, it is not at all
apparent in the situation before us today. The contract at issue
here contains a very atypical and carefully crafted arbitration
clause designed to lull the loan consumer into believing that,
although any dispute would be subject to an arbitration
proceeding in a distant forum, that proceeding nevertheless would be under the aegis of a public body and conducted under procedural rules approved by that body. The parties might have chosen arbitration even if they could not have had the arbitrator whom they had specified or even if the rules to which they had stipulated were not available. But even if these circumstances had been tolerable, a far more basic infirmity would have remained: One party, namely the loan consumer, would have been left without a basic protection and essential part of his bargain—the auspices of a public entity of tribal governance. The loan consumers did not agree to arbitration under any and all circumstances, but only to arbitration under carefully controlled circumstances—circumstances that never existed and for which a substitute cannot be constructed.

In sum, the arbitration clause is both procedurally and substantively unconscionable under Illinois law. It is procedurally unconscionable because the Plaintiffs could not have ascertained or understood the arbitration procedure to which they were agreeing because it did not exist. It is substantively unconscionable because it allowed the Loan Entities to manipulate what purported to be a fair arbitration process by selecting an arbitrator and proceeding according to nonexistent rules. It is clearly “unreasonable” under the standard articulated in M/S Bremen. Under such circumstances, the FAA does not preempt state law, nor does it operate to permit the creation, from scratch, of an alternate arbitral mechanism.
C.

Having concluded that the arbitration clause contained in the loan agreements is unenforceable, we now turn to the Loan Entities’ alternative argument for affirmance—that the agreements’ forum selection clause requires any litigation to be conducted in the courts of the Cheyenne River Sioux Tribe.

1.

“[T]he inherent sovereign powers of an Indian\textsuperscript{40} tribe do not extend to the activities of nonmembers of the tribe.” Montana v. United States, 450 U.S. 544, 565 (1981). Nevertheless, “Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.” Id. Recognizing this limited right, the Court in Montana articulated two narrow situations in which a tribe may exercise jurisdiction over nonmembers: (1) “[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements”; and (2) “[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” Id. at

\textsuperscript{40} Throughout this opinion, we use the term “Indian” rather than “Native American,” reflecting the fact that both tradition, governing statutes, and cases follow that practice.
565, 566. The Loan Entities maintain that the tribal courts have jurisdiction over the present dispute under the first exception.

The Loan Entities have not met their burden of establishing tribal court jurisdiction over the Plaintiffs’ claims. We begin with the Supreme Court’s initial observation in Montana that tribal court jurisdiction over non-Indians is limited: “Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.” Id. at 565 (emphasis added). “[A] tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction”; therefore, if a tribe does not have the authority to regulate an activity, the tribal court similarly lacks jurisdiction to hear a claim based on that activity. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 330 (2008) (internal quotation marks omitted).

In Plains Commerce Bank, the Court explicitly noted that the nature of tribal court authority over non-Indians is circumscribed: “We have frequently noted, however, that the sovereignty that the Indian tribes retain is of a unique and limited character. It centers on the land held by the tribe and on the tribal members within the reservation.” Id. at 327 (emphasis added) (citation omitted) (internal quotation marks omitted). In short, “Montana and its progeny permit tribal regulation of nonmem-

41 Cf. Attorney’s Process & Investigation Servs., Inc. v. Sac & Fox Tribe of the Miss. in Iowa, 609 F.3d 927, 936 (8th Cir. 2010) (“Because ‘efforts by a tribe to regulate nonmembers … are presumptively invalid,’ the Tribe bears the burden of showing that its assertion of jurisdiction falls within one of the Montana exceptions.” (alteration in original) (quoting Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 330 (2008))).
ber conduct inside the reservation that implicates the tribe’s sovereign interests.” Id. at 332 (additional emphasis added).

Here, the Plaintiffs have not engaged in any activities inside the reservation. They did not enter the reservation to apply for the loans, negotiate the loans, or execute loan documents. They applied for loans in Illinois by accessing a website. They made payments on the loans and paid the financing charges from Illinois. Because the Plaintiffs' activities do not implicate the sovereignty of the tribe over its land and its concomitant authority to regulate the activity of nonmembers on that land, the tribal courts do not have jurisdiction over the Plaintiffs’ claims.42

2.

We also are unpersuaded by the Defendants’ argument that the Plaintiffs “consented to tribal jurisdiction.” Appellees’ Br. 37. As the Court has noted on more than one occasion, tribal

42 Because we rest our determination of tribal court jurisdiction on this basis, we need not consider whether any of the Loan Entities would be considered a member of the tribe for purposes of the first Montana exception. See Appellees’ Br. 31.

We also note that, at several places in their submissions, the Loan Entities suggest that the dispute concerns “on reservation” activities because that is where Western Sky executed the contracts. See, e.g., Appellees’ Br. 36; Defendants’ Reply Br. 24. The question of a tribal court’s subject matter jurisdiction over a nonmember, however, is tethered to the nonmember’s actions, specifically the nonmember’s actions on the tribal land. There simply is no allegation here that the dispute involves activities of the Plaintiffs on the reservation.
No. 12-2617
35

courts are not courts of general jurisdiction. See Nevada v. Hicks,
533 U.S. 353, 367 (2001). Moreover, a tribal court’s authority to
adjudicate claims involving nonmembers concerns its subject
matter jurisdiction, not personal jurisdiction. See id. n.8.
Therefore, a nonmember’s consent to tribal authority is not
sufficient to establish the jurisdiction of a tribal court. As the
Court explained in Plains Commerce Bank:

Tribal sovereignty, it should be remembered, is a
sovereignty outside the basic structure of the Consti-
tution. The Bill of Rights does not apply to Indian
tribes. Indian courts differ from traditional Ameri-
can courts in a number of significant respects. And
nonmembers have no part in tribal
government—they have no say in the laws and
regulations that govern tribal territory. Conse-
quently, those laws and regulations may be fairly
imposed on nonmembers only if the nonmember
has consented, either expressly or by his actions.
Even then, the regulation must stem from the tribe’s
inherent sovereign authority to set conditions on entry,
preserve tribal self-government, or control internal
relations.

554 U.S. at 337 (emphasis added) (citations omitted) (internal
quotation marks omitted). The Loan Entities, however, have
made no showing that the present dispute implicates any
aspect of “the tribe’s inherent sovereign authority.”

43 Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians, 746 F.3d 167 (5th
Cir. 2014), is not to the contrary. Dolgencorp concerned the tribal court’s
(continued...)
3.

The Loan Entities maintain, however, that the doctrine of tribal exhaustion requires that the issue of jurisdiction be decided, in the first instance, by a tribal court. The concept of

43 (...continued) authority over tort claims brought by a thirteen-year-old tribal member against the corporate owner of a Dollar General store located on reservation land. The tribal member was participating in a tribe-operated job training program at the store when he was sexually molested by the store manager. The tribal member sued Dolgencorp in tribal court and alleged that the corporation was vicariously liable for the manager’s actions and that it negligently had hired, trained, or supervised the manager. Dolgencorp unsuccessfully sought an injunction against the tribal action in federal district court. In holding that the tribal court had jurisdiction over these claims, the Fifth Circuit rejected Dolgencorp’s argument “that Plains Commerce narrowed the Montana consensual relationship exception, allowing tribes to regulate consensual relationships with nonmembers only upon a showing that the specific relationships ‘implicate tribal governance and internal relations.’” Id. at 174 (emphasis added) (quoting Plains Commerce Bank, 554 U.S. at 334–35). It stated:

It is hard to imagine how a single employment relationship between a tribe member and a business could ever have such an impact. On the other hand, at a higher level of generality, the ability to regulate the working conditions (particularly as pertains to health and safety) of tribe members employed on reservation land is plainly central to the tribe’s power of self-government. Nothing in Plains Commerce requires a focus on the highly specific rather than the general.

Id. at 175. In the present situation, there is no equivalent tribal concern that satisfied the requirement of Plains Commerce Bank.
federal court abstention in cases involving Indian tribes known as the “tribal exhaustion rule” generally “requires that federal courts abstain from hearing certain claims relating to Indian tribes until the plaintiff has first exhausted those claims in a tribal court.” Garcia v. Akwesasne Hous. Auth., 268 F.3d 76, 79 (2d Cir. 2001). It is not at all clear, however, that the doctrine of tribal exhaustion requires a federal court to abstain from exercising jurisdiction when that exercise will not interfere with a pending tribal court action. See Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803, 814 (7th Cir. 1993) (“It is unclear as to how broadly Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987), and National Farmers Union Insurance Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985), should be read. … [T]he two Supreme Court cases dealt only with the situation where a tribal court’s jurisdiction over a dispute has been challenged by a later-filed action in federal court.”).

Even assuming that the

44 The courts of appeals that have addressed the issue have reached opposite conclusions. In Garcia v. Akwesasne Housing Authority, 268 F.3d 76, 80 (2d Cir. 2001), the Court of Appeals for the Second Circuit held that tribal exhaustion was not required absent an ongoing tribal proceeding. It explained its rationale accordingly:

This Court and the Supreme Court have required abstention under the tribal exhaustion rule on just three occasions: Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. [9,] 14–20[ (1987)]; National Farmers Union Insurance Cos. v. Crow Tribe of Indians, 471 U.S. [845,] 853–56 [(1985)]; and Basil Cook Enters. v. St. Regis Mohawk Tribe, 117 F.3d 61 (2d Cir. 1997). In each instance, the plaintiff was litigating a previously-filed, ongoing tribal court action, and was asking the federal court to interfere with those
tribal exhaustion doctrine applies where there are no pending tribal court proceedings, we do not believe that exhaustion is required in this case.

The Loan Entities argue that, “[t]o trigger the tribal exhaustion rule, only a ‘colorable’ claim of tribal subject matter jurisdiction need be asserted.” Even a cursory look at the cases on which the Loan Entities rely, however, reveals that the assertion of tribal jurisdiction here is not “colorable.”

(...continued)

tribal proceedings. These cases are procedurally distinguishable from Garcia’s case because Garcia’s claims have not been in tribal court. We conclude that the reasoning of these cases and the policy considerations that underlie them militate in favor of the opposite result in this case: the comity and deference owed to a tribal court that is adjudicating an intra-tribal dispute under tribal law does not compel abstention by a federal court where a non-member asserts state and federal claims and nothing is pending in the tribal court.

Id. (parallel citations omitted). But see, e.g., United States v. Plainbull, 957 F.2d 724, 728 (9th Cir. 1992) (rejecting the Government’s argument that “the district court abused its discretion by abstaining from the merits of this case because there was no concurrent action pending in the tribal courts” because “[w]hether a tribal action is pending, however, does not determine whether abstention is appropriate”).

Neither party addressed the issue whether the tribal exhaustion doctrine applies in the absence of a pending tribal proceeding.

Appellees’ Br. 28 (citing Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 33 (1st Cir. 2000), and Elliott v. White Mountain Apache Tribal Court, 566 F.3d 842 (9th Cir. 2009)).
In *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 33 (1st Cir. 2000), a case decided before *Plains Commerce Bank*, a dispute had arisen between a tribal entity, the Narragansett Indian Wetuomuck Housing Authority, and the Ninigret Development Corporation (a Rhode Island corporation in which a member of the Tribe was a principal) concerning the construction of a low-income, off-reservation housing development for tribal members. On appeal from the district court’s dismissal of the development company’s action, the court addressed whether the doctrine of tribal exhaustion applied. After reviewing the policy considerations underlying this “prudential doctrine,” the court observed that “the tribal exhaustion doctrine d[id] not apply mechanistically to every claim brought by or against an Indian tribe” and that “scope-related” objections to exhaustion could be raised. *Id.* at 31–32. The court explained that, although “activities of non-Indians on reservation lands almost always require exhaustion if they involve the tribe,” where the “dispute arises out of activities conducted elsewhere[,] … an inquiring court must make a particularized examination of the facts and circumstances attendant to the dispute in order to determine whether comity suggests a need for exhaustion of tribal remedies as a precursor to federal court adjudication.” *Id.* at 32 (emphasis added). “[O]ff-the-reservation” conduct, the court observed, “must at a bare minimum impact directly upon tribal affairs” in order to trigger the exhaustion requirement. *Id.* (emphasis added). In *Ninigret*, the court determined that this requirement had been met because “Ninigret’s dealings with the Authority bore directly on the use and disposition of tribal resources (land and money).” *Id.* Here, the Loan Entities do not
posit any way in which the present dispute “impact[s] directly upon tribal affairs.” Id.\textsuperscript{47} There has been no showing that the present dispute involves questions of tribal self-governance or use of tribal resources in the manner present in Ninigret.

\textit{Elliott v. White Mountain Apache Tribal Court}, 566 F.3d 842 (9th Cir. 2009), is equally unhelpful to the Loan Entities in establishing a “colorable” claim of tribal court authority. \textit{Elliott} concerned an action brought by the White Mountain Apache Tribe against a non-Indian, who had gotten lost on reservation lands. In an effort to attract attention, Elliott had set a signal fire, which grew into a substantial forest fire, burned over 400,000 acres, and caused millions of dollars in damage. The tribe brought suit in tribal court for damages, “alleging violations of tribal executive orders, the tribal game and fish code, the tribal natural resource code, and common law negligence and trespass.” Id. at 845. The Ninth Circuit agreed with the tribe that this scenario raised a colorable claim of tribal jurisdiction:

The tribe seeks to enforce its regulations that prohibit, among other things, trespassing onto tribal lands, setting a fire without a permit on tribal lands, and destroying natural resources on tribal lands. The Supreme Court has strongly suggested that a tribe may regulate nonmembers’ conduct on tribal

\textsuperscript{47} The Loan Entities do argue that “the Tribe has an interest in claims against a local, member-owned business for its on-Reservation conduct.” Appellees’ Br. 30. It goes without saying that a dispute in which the tribe takes an “interest,” id., is markedly different from a dispute which “impact[s] directly upon tribal affairs,” Ninigret, 207 F.3d at 32.
lands to the extent that the tribe can “‘assert a landowner’s right to occupy and exclude.’” The tribal regulations at issue stem from the tribe’s “landowner’s right to occupy and exclude.”

Id. at 849–50 (emphasis added) (citations omitted) (quoting Hicks, 533 U.S. at 359). Again, the Loan Entities have asserted nothing akin to the Tribe’s right, as a landowner, “to occupy and exclude.”

The present dispute does not arise from the actions of nonmembers on reservation land and does not otherwise raise issues of tribal integrity, sovereignty, self-government, or allocation of resources. There simply is no colorable claim that the courts of the Cheyenne River Sioux Tribe can exercise jurisdiction over the Plaintiffs. Tribal exhaustion, therefore, is not required.

Conclusion

The arbitration provision contained in the loan agreements is unreasonable and substantively and procedurally unconscionable under federal, state, and tribal law. The district court,

48 Indeed, the other cases relied upon by the Loan Entities for the proposition that tribal exhaustion is required concern regulation of, or actions on, tribal land. See, e.g., Iowa Mut. Ins. Co., 480 U.S. at 11 (concerning insurance company’s liability to a tribe-owned business and its tribe-member employee for injuries sustained on the reservation); Duncan Energy Co. v. Three Affiliated Tribes of Ft. Berthold, 27 F.3d 1294, 1295 (8th Cir. 1994) (concerning tribal court’s authority over a dispute involving tribal taxation of commercial property on reservation land and tribal regulation of employment on reservation land).
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. The district court’s dismissal, therefore, cannot be upheld on the alternative basis that this dispute belongs in tribal court. We therefore reverse the judgment of the district court granting the Defendants’ motion to dismiss and remand for further proceedings consistent with this opinion. The Plaintiffs may recover their costs in this court.

REVERSED and REMANDED
IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE OTOE-MISSOURIA TRIBE OF INDIANS, a federally-recognized Indian Tribe, GREAT PLAINS LENDING, LLC, a wholly-owned tribal limited liability company, AMERICAN WEB LOAN, INC., a wholly-owned tribal corporation, OTOE-MISSOURIA CONSUMER FINANCE SERVICES REGULATORY COMMISSION, a tribal regulatory agency, LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally-recognized Indian Tribe, RED ROCK TRIBAL LENDING, LLC, a wholly-owned tribal limited liability company, LAC VIEUX DESERT TRIBAL FINANCIAL SERVICES REGULATORY AUTHORITY, a tribal regulatory agency,

Plaintiffs-Appellants,

v.

NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES, BENJAMIN M. LAWSKY, in his official capacity as Superintendent of the New York State Department of Financial Services,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE CONSUMER FINANCIAL PROTECTION BUREAU
AS AMICUS CURIAE SUPPORTING DEFENDANTS-APPELLEES

MEREDITH FUCHS
General Counsel
TO-QUYEN TRUONG
Deputy General Counsel
DAVID M. GOSSETT
Assistant General Counsel
KRISTIN BATEMAN
BRADLEY LIPTON
Attorneys

November 13, 2013

CONSUMER FINANCIAL PROTECTION BUREAU
1700 G Street NW
Washington DC 20552
(202) 435-7821
# TABLE OF CONTENTS

**TABLE OF AUTHORITIES** ........................................................................................................... ii

**INTEREST OF AMICUS CURIAE** .......................................................................................... 1

**BACKGROUND** ....................................................................................................................... 2

  A. The Bureau’s Creation and Authorities ........................................................................... 2

  B. State Consumer Financial Protection ............................................................................. 4

  C. The Bureau’s Relationship with Tribes ............................................................................ 4

**SUMMARY OF ARGUMENT** .................................................................................................... 6

**ARGUMENT** ............................................................................................................................ 7

  The Consumer Financial Protection Act generally does not affect whether states may apply their consumer-protection laws to tribally affiliated lenders. ........7

    A. The CFPA reveals no interest in “uniform regulation” or in “preserving consumer access” to particular types of credit that would generally preclude states from applying their consumer-protection laws to tribally affiliated lenders. .................................................................9

    B. The CFPA’s inclusion of tribes in the definition of “State” does not reveal a federal interest in protecting tribally affiliated lenders from state consumer-protection laws .................................................................11

**CONCLUSION** ......................................................................................................................... 14

**CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)** .......................................................... 15

**CERTIFICATE OF SERVICE** .................................................................................................... 16
# TABLE OF AUTHORITIES

## Cases

*California v. Cabazon Band of Mission Indians,*
  480 U.S. 202 (1987) ........................................................................................................... 8

*Consumer Financial Protection Bureau et al. v. Payday Loan Debt Solution, Inc.,*  
  No. 1:12-cv-24410 (S.D. Fla. 2012) ................................................................................. 4

*Donovan v. Coeur d'Alene Tribal Farm,*  
  751 F.2d 1113 (9th Cir. 1985) ........................................................................................... 6

*Fed. Power Comm'n v. Tuscarora Indian Nation,*  
  362 U.S. 99 (1960) ............................................................................................................. 6

## Statutes

12 U.S.C. § 1465(a)-(b) ........................................................................................................... 9

12 U.S.C. § 25b(a)-(g) ........................................................................................................... 9

12 U.S.C. § 25b(h) ................................................................................................................ 9

12 U.S.C. § 25b(i)-(j), § 1465(c)-(d) .................................................................................... 10

12 U.S.C. § 5481(27) ..................................................................................................... 4, 8, 11

12 U.S.C. § 5491(a) ........................................................................................................... 3

12 U.S.C. § 5495 ............................................................................................................. 10, 12

12 U.S.C. § 5511(a) ........................................................................................................... 2

12 U.S.C. § 5512(b)(1) ..................................................................................................... 3

12 U.S.C. § 5551 ............................................................................................................. 10

12 U.S.C. § 5551(a) ........................................................................................................... 4, 7
12 U.S.C. § 5551(a)(1) ........................................................................................................................................ 9
12 U.S.C. § 5551(a)(2) .................................................................................................................................. 10

Rules

Federal Rule of Appellate Procedure 29(a) ........................................................................................................ 1

Other Authorities

Consumer Financial Protection Bureau Policy for Consultation with Tribal Governments ................................................................. 5
Decision and Order on Petition by Great Plains Lending, LLC; MobiLoans, LLC; and Plain Green, LLC To Set Aside Civil Investigative Demands, No. 2013-MISC-Great Plains Lending-0001 (2013) ........................................................................................................ 5
Memorandum of Understanding Between the Consumer Financial Protection Bureau and Navajo Nation Department of Justice (Jan. 2013) ........................................................................................................ 5
INTEREST OF AMICUS CURIAE

After the recent financial crisis, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010), a comprehensive reform of the American financial system designed to alleviate the crisis and prevent its recurrence. Title X of that law, entitled the “Consumer Financial Protection Act of 2010” (CFPA or the Act), established the Consumer Financial Protection Bureau, a new independent agency focused on protecting consumers in the financial marketplace.

In this appeal, Indian tribes and payday lenders apparently affiliated with them contend that the creation of the Bureau and the law establishing it demonstrate various federal interests that weigh against allowing a state to apply its consumer-protection laws to tribally affiliated payday lenders. As a federal agency tasked with enforcing federal consumer law, the Bureau will not speak in this brief to decisions that the State of New York must appropriately make about whether and how to apply its laws. Nor does the Bureau take a position about the proper analysis that the Court should engage in to determine how to interpret and apply state law. But the Bureau has a direct and substantial interest in rebutting the contention that its creation or existence should affect the Court’s analysis. We accordingly submit this brief as amicus curiae pursuant to Federal Rule of Appellate Procedure 29(a).
BACKGROUND

A. The Bureau’s Creation and Authorities

In 2010, Congress created the Bureau as part of a “direct and comprehensive response to the financial crisis that nearly crippled the U.S. economy beginning in 2008.” S. Rep. No. 111-176, at 2 (2010). The Consumer Financial Protection Act charged the Bureau with “ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.” 12 U.S.C. § 5511(a).

The Bureau’s creation was part of Congress’s solution to the problems of the earlier system of federal consumer protection, which was “too fragmented to be effective.” S. Rep. 111-176, at 10. Under that earlier system, “seven different federal regulators” administered consumer financial protection laws, resulting in a dispersion of responsibility that kept those regulators from “adequately protect[ing] consumers and ensur[ing] financial stability.” Id.; accord H.R. Rep. No. 111-367, pt. 1, at 91 (2009) (“Consumer protection in the financial arena is governed by various agencies with different jurisdictions and regulatory approaches. This disparate regulatory system has been blamed in part for the lack of aggressive enforcement against abusive and predatory loan products that contributed to the financial crisis . . . .”). The CFPA substantially consolidated the consumer financial protection responsibilities of those seven federal regulators in the Bureau.
Congress tasked the Bureau with using this consolidated responsibility to “establish a basic, minimum federal level playing field,” as well as to enforce rules consistently, without regard to whether the institution selling a consumer financial product or service is a bank, a credit union, a mortgage broker, or any other type of nondepository financial institution. S. Rep. No. 111-176, at 11.

The Bureau is now the principal federal agency charged with “regulat[ing] the offering and provision of consumer financial products or services under the Federal consumer financial laws.” 12 U.S.C. § 5491(a). The “consumer financial products or services” that the Bureau regulates include, for example, consumer deposit-taking activities, real estate settlement services, debt collection, and all manner of credit extension. Id. § 5481(5), (15). And the “Federal consumer financial laws” that the Bureau administers include eighteen pre-existing consumer-protection statutes, id. § 5481(12), (14), as well as the CFPA itself, which among other things bars providers of consumer financial products and services from engaging in any “unfair, deceptive, or abusive act or practice” in violation of the Act. Id. §§ 5531(a), 5536(a)(1); see also id. § 5481(6) (defining “covered person”). To carry out its responsibilities under these laws, the Bureau may promulgate rules, bring enforcement actions, and supervise certain types of financial institutions. 12 U.S.C. § 5512(b)(1) (rulewriting authority); id. §§ 5561-5565 (enforcement authority); id. §§ 5514, 5515 (supervision authority).
B. State Consumer Financial Protection

The CFPA and the Bureau’s creation did not supplant the states’ historic role in protecting consumers in the financial marketplace. Congress consolidated federal authority for consumer financial protection in the Bureau so that it could establish a “minimum federal level playing field.” S. Rep. No. 111-176, at 11 (emphasis added). At the same time, it expressly preserved states’ authority to enact and enforce laws that provide consumers greater protections, except in narrow circumstances not present here. See 12 U.S.C. § 5551(a).

Consistent with the CFPA’s endorsement of the role of states in protecting consumers, the Bureau has worked cooperatively with states to carry out its responsibilities. The Bureau has, for example, entered into agreements with state financial regulators describing how the Bureau will coordinate with those regulators on examinations of financial institutions. In addition, the Bureau has repeatedly partnered with states to investigate wrongdoing and to bring enforcement actions to halt harmful conduct that violates both federal and state law. See, e.g., Consumer Financial Protection Bureau et al. v. Payday Loan Debt Solution, Inc., No. 1:12-cv-24410, Stipulated Final Judgment and Order, Docket No. 10 (S.D. Fla. 2012).

C. The Bureau’s Relationship with Tribes

The Bureau has also fostered relationships with Indian tribes, which the CFPA includes in the definition of “State,” 12 U.S.C. § 5481(27). In particular, the Bureau has engaged tribes across the country on financial education and has entered into an
information-sharing agreement with the Navajo Nation Department of Justice to help prevent harmful practices targeting Native American consumers. 1 It has also adopted a “Policy for Consultation with Tribal Governments,” through which the Bureau engages in dialogue on proposed regulations, policies, and programs that are expressly directed to tribal governments or tribal members or that have direct implications for Indian tribes. 2

At the same time, the Bureau has made clear that affiliation with an Indian tribe does not exempt a financial institution from complying with federal consumer financial law. For example, the Bureau recently denied a petition that several tribally affiliated payday lenders—including Appellant Great Plains Lending, LLC—filed seeking to set aside civil investigative demands that the Bureau issued to them as part of an investigation into possibly illegal practices. 3 In that petition, the lenders argued that the CFPA did not apply to them because of their tribal affiliation, and that the Bureau therefore lacked authority to issue civil investigative demands to them. See


Great Plains Decision and Order at 2. The Bureau rejected that argument. Id. at 3-6. In particular, the Bureau explained that investigating the lenders’ commercial relations with non-Indians on the open market did not interfere with tribal self-government on purely intramural matters; nor did it affect any treaty-protected rights. Id. at 4-5. The Bureau further explained that nothing in the CFPA—including the provision that includes tribes in the definition of “State”—revealed any congressional intent to exempt tribally affiliated lenders from the CFPA’s coverage. Id. at 5-6. Thus, under the well-established framework for analyzing whether a federal statute applies to a tribally affiliated entity, the CFPA applied to the tribally affiliated lenders. Id. at 3-6 (applying Fed. Power Comm’n v. Tuscarora Indian Nation, 362 U.S. 99, 116 (1960) and Donovan v. Coeur d’Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985), among other precedents).

SUMMARY OF ARGUMENT

The Bureau takes no position in this brief on whether the Court must balance federal, state, and tribal interests to determine if a state may apply its laws to tribally affiliated lenders that make loans to the state’s residents over the internet; nor does it take a position on the underlying question of the applicability of New York law here. But if the Court does apply an interest-balancing framework, it should find that neither the passage of the CFPA nor the creation of the Bureau demonstrates any federal interest that weighs against allowing states to apply their consumer-protection laws to tribally affiliated lenders. The CFPA does not reflect federal interests in
“uniform regulation” of the consumer financial marketplace nationwide, or in preventing state law from threatening “consumer access” to particular types of credit, of the sort that would prevent New York from applying its laws here. On the contrary, with only narrow exceptions not present here, the Act expressly preserves states’ varying consumer-protection laws as applied here, including those that would outlaw loans with certain terms. See 12 U.S.C. § 5551(a). And although the CFPA recognizes that tribes, like states, have a role in regulating consumer financial products and services, and that the Bureau will coordinate with tribes and states in protecting consumers, that has no bearing on whether tribally affiliated lenders must comply with state laws.

ARGUMENT

The Consumer Financial Protection Act generally does not affect whether states may apply their consumer-protection laws to tribally affiliated lenders.

In their brief, Appellants argue that, to determine whether a state may apply its laws to tribally affiliated lenders that make loans to the state’s residents over the internet, the Court must balance the federal, state, and tribal interests at stake. Appellants’ Br. at 16-21. The Bureau takes no position in this brief on whether this is in fact the proper analytical framework for determining the applicability of state law in this case, nor on the question whether New York’s laws in fact apply. But if the Court applies Appellants’ framework, it should reject their contention (at 28-29) that the
CFPA demonstrates a federal interest in protecting tribally affiliated lenders from state regulation that would otherwise apply.

Courts have found that federal interests preclude states from applying their laws to tribally affiliated entities where, for example, “federal policy is to promote precisely what [the state] seeks to prevent.” *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 220 (1987) (concluding that state could not regulate tribal bingo enterprises where federal government approved and actively promoted those enterprises). But that is not the case here. The CFPA does not mention tribal lending operations, much less give them special protections or otherwise promote them.

And the CFPA reveals no other interests that weigh against allowing states to apply their laws to tribally affiliated lenders. Contrary to Appellants’ assertion (at 28), the CFPA does not reflect general interests in “uniform regulation” or in “preserving consumer access” to particular types of loans of the sort that would preclude New York from applying its consumer-protection laws here. Nor does the fact that the CFPA includes tribes in the definition of “State,” 12 U.S.C. § 5481(27), reveal any federal interest in giving tribally affiliated lenders special protection from state consumer-protection laws.
A. The CFPA reveals no interest in “uniform regulation” or in “preserving consumer access” to particular types of credit that would generally preclude states from applying their consumer-protection laws to tribally affiliated lenders.

In contending that the CFPA insulates tribally affiliated lenders from state consumer-protection laws, Appellants emphasize supposed federal interests in “uniform consumer protection regulation” nationwide and in “preserving consumer access” to short-term credit. Appellants’ Br. at 28. But this argument—which would support exempting everyone, not merely tribally affiliated entities, from state consumer-protection laws—is foreclosed by the CFPA’s plain terms.

In particular, the CFPA expressly provides that it does not displace or otherwise affect states’ varying laws, except to the extent they are inconsistent with the CFPA, and except as applied to certain specific types of entities not involved here. Section 1041(a) of the CFPA (codified at 12 U.S.C. § 5551(a)(1)) provides that

[The CFPA] may not be construed as annulling, altering, or affecting any person subject to the provisions of this title from complying with, the statutes, regulations, orders, or interpretations in effect in any State, except to the extent that any such provision of law is inconsistent with the provisions of this title, and then only to the extent of the inconsistency.

This provision thus generally reaffirms that states may continue to apply their own laws post-CFPA, and demonstrates that Congress did not intend for “uniform” nationwide regulation that would displace all state law. Although this provision contains specific exceptions for certain entities—such as national banks—for which
federal law may more broadly preempt state laws, those exceptions do not support
the tribe’s arguments in this case. Tribally affiliated lenders are not included among
those excepted.

Section 1041 also refutes Appellants’ proposition (at 28) that the CFPA
demonstrates an interest in preserving “consumer access” to short-term credit on any
terms. That provision specifies that state laws that are “inconsistent with” the CFPA
are preempted, but clarifies that a state law will not be deemed “inconsistent with” the
Act “if the protection that [state law] affords to consumers is greater than the
protection provided under [the CFPA].” Id. § 5551(a)(2). Thus, a state generally
remains free to regulate or ban products that it believes to be harmful to consumers,
even if those regulations go beyond federal rules.

Appellants fail to acknowledge section 1041, and do not suggest that New York
law is “inconsistent with” the CFPA for purposes of that provision. Instead, in the
hope of nonetheless obtaining broad preemption, Appellants ask this Court to discern
a federal interest in “uniform regulation” from a provision that directs the Bureau to

4 Section 1041(a) provides that the Act, “other than sections 1044 through 1048”
does not preempt state law. Sections 1044 through 1047 of the Act address
preemption standards for certain types of institutions, such as national banks. See
CFPA § 1044 (codified at 12 U.S.C. § 25b(a)-(g)) (national banks and subsidiaries);
CFPA § 1045 (codified at 12 U.S.C. § 25b(h)) (nondepository institution subsidiaries
and affiliates of national banks); CFPA § 1046 (codified at 12 U.S.C. § 1465(a)-(b))
(federal savings associations and subsidiaries); CFPA § 1047 (codified at 12 U.S.C.
§ 25b(i)-(j), § 1465(c)-(d)) (national banks and savings associations). And section 1048
sets the effective date for the subtitle. CFPA § 1048 (codified at 12 U.S.C. § 5551
note).
coordinate with federal and state regulators “to promote consistent regulatory treatment of consumer financial and investment products and services,” 12 U.S.C. § 5495 (directing the Bureau to “coordinate with the [Securities and Exchange] Commission, the Commodity Futures Trading Commission, the Federal Trade Commission, and other Federal agencies and State regulators, as appropriate”). Appellants’ Br. at 28. They similarly contend that a House Report issued three years after the CFPA’s enactment reveals a federal interest in preserving consumers’ “access to credit.” Appellants’ Br. at 28 (citing H.R. Rep. No. 113-23 (2013)). But neither the CFPA’s mention of “consistent regulatory treatment” nor a House Report’s reference to “access to credit” trumps section 1041’s clear statement about when the CFPA preempts state law.

B. The CFPA’s inclusion of tribes in the definition of “State” does not reveal a federal interest in protecting tribally affiliated lenders from state consumer-protection laws.

Appellants apparently base their assertion of a federal interest in preventing states from applying their laws to tribally affiliated entities in significant part on the provision of the CFPA that defines “State” to include not just the fifty states but also “federally recognized Indian tribe[s],” 12 U.S.C. § 5481(27). Appellants’ Br. at 28.

The provision provides in full that “[t]he term ‘State’ means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, or the United States Virgin Islands or any federally recognized Indian tribe, as defined by the Secretary of the Interior under section 479a-1(a) of Title 25.” 12 U.S.C. § 5481(27).
According to Appellants, this provision “made clear that the Tribes are co-equal with the States for purposes of regulatory enforcement of consumer protection laws” and “contemplates coordination between the Tribes and the States, led by the CFPB, to promote consistent regulatory treatment of short-term loans.” Id. But neither the CFPA’s recognition of the role of tribes in “regulatory enforcement” nor the Bureau’s (or the states’) coordination with tribes demonstrates a federal interest in exempting tribes or entities affiliated with them from state laws that otherwise would apply to them.

First, although the CFPA recognizes a role for tribes in “regulatory enforcement of consumer protection laws” by defining “State” to include tribes, there is no reason to believe that this recognition has any effect on whether or not tribally affiliated lenders are subject to state regulation. By recognizing tribes’ (and states’) authority to regulate entities within their jurisdictions, the CFPA does not grant tribes (or states) exclusive authority over those entities—whether tribally affiliated or not—when those entities also transact business in another regulator’s territory. Additionally, the fact that tribes are recognized as regulators has no bearing on whether or not tribes or their affiliated entities are subject to regulation by other sovereigns when they themselves transact business in another regulator’s territory.

Second, Appellants are wrong to suggest that the CFPA “contemplates coordination between the Tribes and the States,” or that this somehow indicates that tribally affiliated lenders need not comply with state regulation. Appellants’ Br. at 28.
As an initial matter, the CFPA does not speak to coordination between tribes and states, but rather speaks only to the Bureau’s coordination with other regulators. See, e.g., 12 U.S.C. § 5495. And, in any event, Appellants fail to explain how allowing states to apply their laws to tribally affiliated lenders would interfere with the “coordination” contemplated by the CFPA. Coordination does not require consensus, and nothing in the CFPA suggests that a regulator must obtain other affected regulators’ approval before it can enforce its own consumer-protection laws.
CONCLUSION

The Bureau takes no position in this brief on whether resolution of this case requires the Court to balance state, federal, and tribal interests, or on any specific question about the interpretation or applicability of New York law. But to the extent it is relevant, the Bureau respectfully requests that the Court find that neither the passage of the CFPA nor the creation of the Bureau demonstrates a federal interest that would preclude states from applying their otherwise-applicable consumer-protection laws to tribally affiliated lenders.

Respectfully submitted,

MEREDITH FUCHS
General Counsel
TO-QUYEN TRUONG
Deputy General Counsel

/s/ David M. Gossett
DAVID M. GOSSETT
Assistant General Counsel
KRISTIN BATEMAN
BRADLEY LIPTON
Attorneys

Consumer Financial Protection Bureau
1700 G Street NW
Washington DC 20552
(202) 435-7821

November 13, 2013
CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3078 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word 2010.

/s/ David M. Gossett
David M. Gossett
CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2013, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I further certify that I will cause 6 paper copies of this brief to be filed with the Court within three business days.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ David M. Gossett
David M. Gossett
FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WATER WHEEL CAMP RECREATIONAL AREA, INC. and ROBERT JOHNSON,
Plaintiffs-Appellees,

v.

GARY LARANCE, The Honorable
Judge in his capacity as the Chief
and Presiding Judge of the
Colorado River Indian Tribes
Tribal Court, JOLENE MARSHALL,
Defendants-Appellants.

No. 09-17349
D.C. No. 2:08-CV-00474-DGC

WATER WHEEL CAMP RECREATIONAL AREA, INC. and ROBERT JOHNSON,
Plaintiffs-Appellants,

v.

GARY LARANCE, The Honorable
Judge in his capacity as the Chief
and Presiding Judge of the
Colorado River Indian Tribes
Tribal Court, JOLENE MARSHALL,
Defendants-Appellees.

No. 09-17357
D.C. No. 2:08-CV-00474-DGC

Appeal from the United States District Court
for the District of Arizona
David G. Campbell, District Judge, Presiding

Argued and Submitted
February 17, 2011—San Francisco, California

Filed June 10, 2011

8021

Per Curiam Opinion

*The Honorable Suzanne B. Conlon, United States District Judge for the Northern District of Illinois, sitting by designation.
COUNSEL

Tim Vollmann and Gwenellen P. Janov (argued), Albuquerque, New Mexico, for defendants-appellants The Honorable Gary LaRance and Jolene Marshall.

Dennis J. Whittlesey (argued), Dickinson Wright PLLC, Washington D.C., for plaintiff-cross-appellant Water Wheel Camp Recreational Area, Inc., and plaintiff-appellee Robert Johnson.

Ellison Folk and Winter King, Shute, Mihaly & Weinberger LLP, San Francisco, California; Eric Shepard, Office of the Attorney General, Parker, Arizona, for amicus curiae Colorado River Indian Tribes.

Carl Bryant Rogers, VanAmberg, Rogers, Yepa, Abeita & Gomez, LLP, Santa Fe, New Mexico; Melody L. McCoy, Native American Rights Fund, Boulder, Colorado, for amicus curiae The National American Indian Court Judges Association.

John L. Smeltzer (argued), Environment & Natural Resources Division, United States Department of Justice, Washington D.C., for amicus curiae United States.

Timothy Ward Woolsey, Nespelem, Washington, for amicus curiae Confederated Tribes of the Colville Indian Reservation.

OPINION

PER CURIAM:

A tribal court system exercised jurisdiction over a non-Indian closely held corporation and its non-Indian owner in an unlawful detainer action for breach of a lease of tribal lands and trespass. It entered judgment in favor of the tribe. We examine the extent of an Indian tribe’s civil authority over non-Indians acting on tribal land within the reservation. We hold that under the circumstances presented here, where there are no sufficient competing state interests at play, *Nevada v. Hicks*, 533 U.S. 353, 359-60 (2001), the tribe has regulatory jurisdiction through its inherent authority to exclude, independent from the power recognized in *Montana v. United States*, 450 U.S. 544 (1981). Because regulatory jurisdiction exists, we also consider whether adjudicative jurisdiction exists. In light of Supreme Court precedent recognizing tribes’ inherent civil authority over non-Indian conduct on tribal land and congressional interest in promoting tribal self-government, we conclude that it does. Finally, applying traditional personal jurisdiction principles, we hold that in this instance, the tribal court has personal jurisdiction over a non-Indian agent acting on tribal land.
In 1975, the Colorado River Indian Tribes ("CRIT") and Water Wheel Camp Recreational Area, Inc. ("Water Wheel") entered into a thirty-two-year business lease of twenty-six acres of CRIT tribal land located within the reservation along the California side of the Colorado River. The land is held in trust by the United States and the local Superintendent of the Bureau of Indian Affairs ("BIA") approved the lease under the authority delegated by the Secretary of the Department of the Interior, as required by law. See 25 U.S.C. § 415(a) (2006). Throughout the term of the lease, Water Wheel operated a recreational resort on the leased tribal land that included a marina, convenience store, bar, trailer and camping spaces, and related facilities.

Robert Johnson, a non-Indian, purchased from non-Indian owners half of Water Wheel’s stock in 1981 and the remaining stock in 1985, at which point he became president of the corporation. He controlled and operated the Water Wheel resort on CRIT land for more than twenty-two years while living at the site. Under the lease agreement, he collected rents from the resort’s subtenants and paid that rent to the tribe. The lease called for renegotiation of the minimum base rental value after twenty-five years to more accurately reflect the current market value, but in 2000, when it was time to renegotiate, the CRIT and Johnson (acting on behalf of Water Wheel) failed to reach an agreement. After that, Water Wheel stopped making payments as required by the lease. Beginning in 2001, the corporation stopped paying the required percentage of gross business receipts. It paid only nominal rent in 2003 and 2004, and failed to pay any rent at all beginning in 2005.

1Water Wheel contested the status of the land before the tribal court, but waived the argument before the district court. Water Wheel and Robert Johnson concede that outside of the lease, they have no right to occupy or use the land.
When the lease expired on July 6, 2007, Water Wheel and Johnson failed to vacate the property “peaceably and without legal process” as the lease required. Instead, Johnson continued to operate Water Wheel and collect funds from resort patrons, but paid nothing to the tribe. When he refused to vacate, the CRIT filed suit against Water Wheel and Johnson in tribal court for eviction, unpaid rent, damages from the tribe’s loss of use of their property, and attorney’s fees. Johnson and Water Wheel challenged both the tribe’s right to evict them and the jurisdiction of the CRIT tribal courts. They moved to dismiss, arguing in relevant part that the tribal court lacked subject matter jurisdiction under Montana, 450 U.S. 544, and lacked personal jurisdiction over Johnson.

The tribal court denied the motions to dismiss and, following a three-day trial on the merits, ruled in favor of the CRIT on all claims. The tribal court found that because Water Wheel had entered into a consensual relationship with the tribe through commercial dealings, the court had subject matter jurisdiction over Water Wheel under Montana’s first exception.\(^2\) Regarding Johnson himself, the tribal court reasoned that it had subject matter jurisdiction over the breach of lease under Montana’s first exception and that it had personal jurisdiction over him because Johnson had “sufficient minimum contacts” with the CRIT to support the exercise of jurisdiction. Specifically, the court determined that Johnson’s business dealings and his continuing trespass after the lease expired provided sufficient contacts necessary to establish personal jurisdiction. The court further reasoned that it had subject matter jurisdiction over Water Wheel and Johnson

\(^2\)Montana, discussed in greater detail below, held that a tribe may not regulate the activities of non-Indians on non-Indian fee land within the reservation unless one of two exceptions applies. The first exception exists where non-Indians “enter consensual relationships with the tribe or its members,” and the second exception exists where the conduct of a non-Indian “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” 450 U.S. at 566.
through its own laws and ordinances for purposes of eviction and assessing damages.

Finally, the tribal court noted that Water Wheel and Johnson had repeatedly and willfully disobeyed pretrial orders compelling discovery of financial and corporate records. As a sanction, the court found as true the tribe’s contention that Water Wheel and Johnson were “alter egos” and, pursuant to tribal rules of civil procedure that mirror the Federal Rules of Civil Procedure, that the facts embraced in the discovery requests were established as the tribe had claimed. Specifically, the tribal court found that Water Wheel was inadequately capitalized; that the corporation and Johnson had made gifts to each other since 1999 in fraud of creditors; and that Johnson borrowed funds for his own personal use, failed to maintain separate financial records, failed to keep formal corporate board meeting minutes, failed to elect directors, and had commingled corporate money with his own personal assets instead of paying the rent. In light of these factual findings, the tribal court pierced the corporate veil to hold Johnson personally and jointly liable for all damages related to breach of the lease agreement.

The tribal court of appeals affirmed.\(^3\) In a fifty-eight-page opinion, the appellate court held that the CRIT had subject matter jurisdiction both through its inherent sovereign authority and through the first and second Montana exceptions. The court noted the importance the Supreme Court has placed on land ownership in determining questions of civil jurisdiction. It also observed that in light of the long-recognized power of Indian tribes to exclude non-Indians from Indian-owned land, the Court has, with one narrow exception, “consistently upheld the exercise of tribal authority over non-member activ-

\(^3\)The court reversed the award for trespass damages and remanded for recalculation based on the fair rental value of the formerly leased property. That issue is not before us.
ity on tribal or other Indian owned land within an Indian reservation” (emphasis in original).

The appellate court further determined that Montana’s first exception was satisfied because the possessory claims of Water Wheel and Johnson flowed solely from a federally approved surface lease of lands owned by the tribe within its reservation and thus clearly constituted a consensual relationship. Additionally, the court found that Montana’s second exception was satisfied because substantial tribal revenues were at stake and because, “[f]or the Tribe, as for most Indian tribes, its land constitutes its single most valuable economic asset,” and the activities of Johnson and Water Wheel interfered with the tribe’s ability to manage and use its own land.

Regarding personal jurisdiction over Johnson, the court found that in agreeing to and benefitting from the lease, Johnson had consented to the tribal court’s exercise of jurisdiction. For purposes of the trespass claim, the court found that the damages were properly directed at Johnson as an individual because he had overstayed the lease. The court also noted that both Water Wheel and Johnson had been properly served while on the Water Wheel site within the reservation.

While the case was pending before the tribal court, Water Wheel and Johnson filed a complaint in the District of Arizona seeking declaratory and injunctive relief against the tribal court’s exercise of jurisdiction. After the tribal court of appeals issued its decision, the district court reviewed the jurisdictional questions. The district court declined to reach the question whether the tribe’s inherent authority to exclude non-Indians from tribal land provided jurisdiction over Water Wheel. Relying on the facts surrounding the lease between the CRIT and Water Wheel, the district court found a consensual relationship existed and that the tribal court had subject matter jurisdiction over Water Wheel under Montana’s first exception.4

4The court reasoned that it did not need to reach the question regarding the tribe’s inherent authority given its decision that Montana’s first excep-
The court further determined that the tribe had not waived its sovereign powers through the lease and that BIA regulations did not preempt tribal court jurisdiction.

The district court rejected the tribe’s argument that its inherent power to exclude provides a basis for jurisdiction over Johnson independent of Montana, reasoning that Montana applied to determine whether a tribe could exercise its inherent authority to exclude. In a footnote, the court attempted to clarify that its decision addressed only whether the tribe’s authority to exclude provided a jurisdictional basis for Johnson, not that Montana would prevent the tribe from excluding Johnson from tribal land. The court did not consider the connection between the tribe’s authority to exclude and its regulatory jurisdiction, nor did it consider whether the tribe’s status as landowner made any difference to the analysis.

Considering tribal court’s jurisdiction over Johnson, the district court first determined whether Johnson’s relationship with the CRIT was consensual. Johnson argued that he had protested the CRIT’s involvement and had not understood that he, personally, would be dealing with the tribe, so the relationship was not voluntary. The district court agreed, noting that the tribal court made no factual findings regarding voluntariness to which the clearly erroneous standard of review could be applied. The district court reasoned that the evidence regarding Johnson’s personal understanding could not “fairly be characterized as his personal consent to the tribe’s jurisdiction,” so Johnson could not have entered into a consensual relationship with the tribe.

The court provided a basis for jurisdiction. Apparently, the court failed to recognize that in applying Montana unnecessarily, it improperly expanded limitations on tribal sovereignty that, with only one narrow exception, have been applied exclusively to non-Indian land.
Finally, the district court rejected the argument that the tribal court had jurisdiction over Johnson through a provision in the lease specifying that Water Wheel, its agents, and its employees would abide by tribal laws and regulations. Nothing in the provision, the court reasoned, suggested that Water Wheel had agreed that its agents would be subject to tribal court jurisdiction. The district court declined to consider the second Montana exception, reasoning that the defendants had not made that argument.

Both parties appealed.

II

We have jurisdiction under 28 U.S.C. § 1291. A decision regarding tribal court jurisdiction is reviewed de novo, and factual findings are reviewed for clear error. Smith v. Salish Kootenai College, 434 F.3d 1127, 1130 (9th Cir. 2006); FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1313-14 (9th Cir. 1990). We have also recognized that because tribal courts are competent law-applying bodies, the tribal court’s determination of its own jurisdiction is entitled to “some deference.” Id. at 1313 (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65-66 (1978)).

As we consider questions of tribal jurisdiction, we are mindful of “the federal policy of deference to tribal courts” and that “[t]he federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, including appellate courts.” Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16-17 (1987); see also United States v. Wheeler, 435 U.S. 313, 332 (1978) (recognizing that “tribal courts are important mechanisms for protecting significant tribal interests”).

III

In considering the extent of a tribe’s civil authority over non-Indians on tribal land, we first acknowledge the long-
standing rule that Indian tribes possess inherent sovereign powers, including the authority to exclude, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983) (“A tribe’s power to exclude nonmembers entirely or to condition their presence on the reservation is . . . well established.”), unless Congress clearly and unambiguously says otherwise. *United States v. Lara*, 541 U.S. 193, 200 (2004) (recognizing that “the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as ‘plenary and exclusive’” (citations omitted)); *Santa Clara Pueblo*, 436 U.S. at 58, 60 (recognizing Congress’s “superior and plenary control” over matters of tribal sovereignty and noting that “a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent”); see also William C. Canby, Jr., *American Indian Law in a Nutshell* 101 (5th ed. 2009) (“Although the doctrine of plenary power of Congress over tribal sovereignty has its critics, it remains in full strength in the courts, so long as Congress makes its intent to limit sovereignty clear.” (internal citation omitted)).

From a tribe’s inherent sovereign powers flow lesser powers, including the power to regulate non-Indians on tribal land. *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993) (recognizing that a tribe’s power to exclude includes the incidental power to regulate). We also adhere to the Supreme Court’s instruction that a tribe’s adjudicative authority may not exceed its regulatory authority. *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997). To exercise its inherent civil authority over a defendant, a tribal court must have both subject matter jurisdiction—consisting of regulatory and adjudicative jurisdiction—and personal jurisdiction. The question we consider is whether and to what extent *Montana* limits these powers. We turn first to the question of subject matter jurisdiction.
Montana is “the pathmarking case concerning tribal civil authority over nonmembers.” Strate, 520 U.S. at 445. In Montana, the Supreme Court stated that the “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.” Montana, 450 U.S. at 564. The narrow question the Court considered in light of this test concerned the tribe’s exercise of regulatory jurisdiction over non-Indians on non-Indian land within the reservation.\(^5\) Id. at 557 (“Though the parties in this case have raised broad questions about the power of the Tribe to regulate hunting and fishing by non-Indians on the reservation, the regulatory issue before us is a narrow one . . . the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe.”).

The Court noted two exceptions to this limitation on tribal powers. First, the Court stated that

\begin{quote}
[t]o be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.
\end{quote}

Id. at 565. Second, the Court stated that, “[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the polit-

\(^5\)A reservation may contain both Indian and non-Indian land, and Indian land may also exist outside of a reservation. See 18 U.S.C. § 1151 (2006).
cal integrity, the economic security, or the health or welfare of the tribe. Id. at 566. These exceptions have come to be known as the two Montana exceptions.

Since deciding Montana, the Supreme Court has applied those exceptions almost exclusively to questions of jurisdiction arising on non-Indian land or its equivalent. See analysis infra. The exception is Hicks, discussed in greater detail below, where the Court noted that while land ownership may sometimes be a “dispositive factor” in determining whether a tribe has jurisdiction over a non-Indian, it was not dispositive when weighed against the state’s considerable interest in executing a search warrant for an off-reservation crime. Hicks, 533 U.S. at 358-60, 363.

Despite the explicitly narrow nature of the question considered in Hicks, the district court applied Montana to determine whether the CRIT has subject matter jurisdiction over non-Indians Water Wheel and Johnson related to their activities on tribal land within the CRIT reservation. The CRIT and the United States, through its amicus brief, argue that Montana does not apply to this case. Their position is that the CRIT’s inherent authority to exclude provides regulatory jurisdiction over Water Wheel and Johnson and that there are no competing state interests at play that might otherwise trigger Montana’s application. They further suggest that because regulatory jurisdiction exists and neither Congress nor the Supreme Court have said otherwise, the tribal court may also exercise adjudicative jurisdiction. We agree.

As a preliminary matter, we consider the relationship between the tribe’s inherent authority to exclude and its authority to exercise jurisdiction. The district court stated, and arguably held despite its footnote indicating otherwise, that a tribe’s inherent authority to exclude a non-Indian from tribal land is subject to Montana. But the Supreme Court has recognized that a tribe’s power to exclude exists independently of its general jurisdictional authority. See Duro v. Reina, 495
U.S. 676, 696-97 (1990) (noting that even where tribes lack criminal jurisdiction over a non-Indian defendant, they “possess their traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands. . . . Tribal law enforcement authorities have the power to restrain those who disturb public order on the reservation, and if necessary, to eject them. Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities”), superseded on other grounds by congressional statute, 25 U.S.C. § 1301.

[2] Montana limited the tribe’s ability to exercise its power to exclude only as applied to the regulation of non-Indians on non-Indian land, not on tribal land. See Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144-45 (1982) (recognizing a tribe’s inherent authority to exclude non-Indians from tribal land, without applying Montana); see also Atkinson Trading Co. v. Shirley, 532 U.S. 645, 654 (2001) (holding that the Navajo Nation’s power to tax, derived in part from its power to exclude, should be considered under Montana because, unlike in Merrion, the incidence of the tax fell “upon non-members on non-Indian fee land”); Bourland, 508 U.S. at 689 (noting that Montana established that “when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands”); Merrion, 455 U.S. at 144-45 (“Nonmembers who lawfully enter tribal lands remain subject to the tribe’s power to exclude them. . . . When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its ultimate power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry.”) (emphasis in original)); Montana, 450 U.S. at 557 (recognizing a tribe’s inherent authority to condition the entry of non-Indians on tribal land as a separate matter from whether a tribe may condition the entry of non-Indians on non-Indian land); Cohen’s Handbook of Federal Indian Law § 4.01[2][e], 220 (Nell Jessup Newton et al. eds., 2005) [here-
inafter Cohen] (explaining that “[b]ecause the exclusionary power is a fundamental sovereign attribute intimately tied to a tribe’s ability to protect the integrity and order of its territory and the welfare of its members, it is an internal matter over which the tribes retain sovereignty”); cf. Atkinson Trading Co., 532 U.S. 645 (holding that the Navajo Nation’s power to exclude did not allow it to tax non-Indians on non-Indian fee land (emphasis added)).

To support its conclusion that Montana applies to a tribe’s inherent authority to exclude persons from tribal land, the district court cited Plains Commerce Bank v. Long Family Land and Cattle Co., Inc., 554 U.S. 316 (2008), and Hardin v. White Mountain Apache Tribe, 779 F.2d 476 (9th Cir. 1985). Plains Commerce Bank considered a tribe’s authority to regulate the alienation of non-Indian land, not the tribe’s power to exclude non-Indians from tribal lands or its sovereign interest in managing tribal land. The district court misinterpreted passages from that opinion discussing Montana’s treatment of regulations that flow from a tribe’s inherent tribal government powers on non-Indian lands to stand for the proposition that a tribe’s power to exclude is subject to Montana. The case the relevant passage in Plains Commerce Bank relies upon demonstrates the error in the district court’s analysis. See 554 U.S. at 335 (citing Bourland, 508 U.S. at 691 n.11). In Bourland, the Court recognized that a tribe loses the regulatory authority that implicitly exists through its power to exclude when the land in question ceases to be tribal land, and cited Montana as supporting that rule. In other words, loss of the power to exclude implies the loss of the incidental power to regulate non-Indians unless a Montana exception applies. Thus, Plains Commerce Bank does not support the district court’s conclusion that a tribe’s right to exclude may be exercised on tribal land only if Montana is satisfied.

Likewise, Hardin stated that the tribe’s exclusion of a criminal from the reservation “falls within the Tribe’s civil powers” and, citing Montana, reasoned that the ordinance was necessary for the health and safety of tribal members. Hardin, 779 F.2d at 478. The court then cited Merrion, 455 U.S. at 144-45 (recognizing a tribe’s authority to exert its inherent power of exclusion over a non-Indian on tribal land without applying Montana), for the rule that tribes have the power to place conditions on entry and that a non-Indian on tribal land remains subject to the risk that the tribe will exercise its sovereign power of exclusion. Hardin, 779 F.2d at 479.

Reading Hardin to stand for the proposition that a tribe’s inherent power of exclusion is subject to Montana would conflict with Supreme
Here, through its sovereign authority over tribal land, the CRIT had power to exclude Water Wheel and Johnson, who were trespassers on the tribe’s land and had violated the conditions of their entry. Having established that the tribe had the power to exclude, we next consider whether it had the power to regulate. The authority to exclude non-Indians from tribal land necessarily includes the lesser authority to set conditions on their entry through regulations. *Merrion*, 455 U.S. at 144 (noting that the power to exclude “necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct”); *Bourland*, 508 U.S. at 689 (noting that in opening up the Cheyenne Sioux Tribe’s tribal lands for public use, Congress “eliminated the Tribe’s power to exclude non-Indians from these lands, and with that the incidental regulatory jurisdiction formerly enjoyed by the Tribe”); *id.* at 691 n.11 (“Regulatory authority goes hand in hand with the power to exclude.”); *see also Montana*, 450 U.S. at 557 (recognizing a tribe’s inherent authority to condition the entry of non-Indians on tribal land through regulations).

As a general rule, both the Supreme Court and the Ninth Circuit have recognized that *Montana* does not affect this fundamental principle as it relates to regulatory jurisdiction over non-Indians on Indian land. *See Bourland*, 508 U.S. at 688-89 (describing *Montana* as establishing that when tribal land is

Court precedent, including the very case *Hardin* cites for support. *Hardin* is best distinguished as considering the narrow question of whether the tribe’s ordinance was an impermissible punishment against a non-Indian for a criminal act. The court held the ordinance did not conflict with *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), reasoning that, despite *Oliphant*’s prohibition against tribes asserting criminal jurisdiction over non-Indians, civil jurisdiction remains. *See Hardin*, 779 F.2d at 478-79. *Hardin* referenced *Montana*’s second exception without considering whether it needed to do so, and appears to have cited the case primarily to support its conclusion that despite a lack of criminal jurisdiction, tribes retain some forms of civil jurisdiction over non-Indians. *See id.* at 478.
converted to non-Indian land, a tribe loses its inherent power to exclude non-Indians from that land and thereby also loses “the incidental regulatory jurisdiction formerly enjoyed by the Tribe”;

*see also Merrion*, 455 U.S. at 144-45 (upholding a tribal tax on non-Indians operating a business on tribal land as a condition of entry derived from the tribe’s inherent power to exclude, without applying *Montana*); *Strate*, 520 U.S. at 456 (noting that the land in question was equivalent to non-Indian land and that “*Montana*, accordingly, governs this case”); *Mescalero Apache Tribe*, 462 U.S. at 330-31 (determining that *Montana* did not apply to the question of a tribe’s regulatory authority over nonmembers on reservation trust land because “*Montana* concerned lands located within the reservation but not owned by the Tribe or its members”); *McDonald v. Means*, 309 F.3d 530, 540 n.9 (9th Cir. 2002) (as amended) (rejecting the argument that *Montana* applies to tribal land because *Montana* limited its holding to non-Indian lands and *Strate* confirmed that limitation); *Burlington N. R. Co. v. Red Wolf*, 196 F.3d 1059, 1062-63 (9th Cir. 1999) (“The threshold question in this appeal is whether *Montana*’s main rule applies, that is, whether the property rights at issue are such that the land may be deemed ‘alienated’ to non-Indians.”).

[4] We must therefore conclude that the CRIT’s right to exclude non-Indians from tribal land includes the power to regulate them Unless Congress has said otherwise, or unless

---

7Further bolstering our conclusion that the tribe has regulatory jurisdiction is the fact that this is an action to evict non-Indians who have violated their conditions of entry and trespassed on tribal land, directly implicating the tribe’s sovereign interest in managing its own lands. See *Plains Commerce Bank*, 554 U.S. at 334-35 (“By virtue of their incorporation into the United States, the tribe’s sovereign interests are now confined to managing tribal land . . . protecting tribal self-government, and controlling internal relations.”) (internal citations and quotation marks omitted)); *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (“Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.”); *see also Merrion*, 455 U.S. at 145 n.12 (recognizing that a tribe’s sovereign power over tribal lands is distinguishable from its power over reservation land generally).
the Supreme Court has recognized that such power conflicts with federal interests promoting tribal self government. *Iowa Mut. Ins. Co.*, 480 U.S. at 18 (“Tribal authority over activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.” (internal citations omitted)); *Merrion*, 455 U.S. at 146 (noting the “established views that Indian tribes retain those fundamental attributes of sovereignty . . . which have not been divested by Congress or by necessary implication of the tribe’s dependent status”); *Santa Clara Pueblo*, 436 U.S. at 56 (“Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.”).

[5] We see no evidence of congressional intent to limit the CRIT’s regulatory jurisdiction in this instance, and the Supreme Court has on only one occasion established an exception to the general rule that *Montana* does not apply to jurisdictional questions arising from the tribe’s authority to exclude non-Indians from tribal land. See *Hicks*, 533 U.S. 353. In *Hicks*, the Court held that where a state has a competing interest in executing a warrant for an off-reservation crime, the tribe’s power of exclusion is not enough on its own to assert regulatory jurisdiction over state officers and *Montana* thus applies. *Id.* at 359-60 (rejecting the tribe’s argument that it could exercise its regulatory authority over state officers as a condition of entry for purposes of executing a search warrant).

Even though in its analysis the Court interpreted *Montana* broadly as applying to both Indian and non-Indian land, the Court explicitly recognized that in some cases, land ownership “may sometimes be a dispositive factor” in establishing a tribal court’s regulatory jurisdiction over non-Indians. *Id.* at 360. *Hicks* expressly limited its holding to “the question of tribal-court jurisdiction over state officers enforcing state law” and left open the question of tribal court jurisdiction
over nonmember defendants generally. \textit{Id.} at 358 n.2; \textit{id.} at 371 (noting that the issue being considered concerned “a narrow category of outsiders”). Furthermore, the Court did not overrule its own precedent specifying that \textit{Montana} ordinarily applies only to non-Indian land.

We have recognized the limited applicability of \textit{Hicks}. See \textit{McDonald}, 309 F.3d at 540 n.9 (rejecting the argument that \textit{Montana} should be extended to bar tribal jurisdiction over the conduct of non-Indians on tribal land because doing so would be inconsistent with \textit{Montana}’s narrow holding and “[e]ven if \textit{Hicks} could be interpreted as suggesting that the \textit{Montana} rule is more generally applicable than either \textit{Montana} or \textit{Strate} have allowed, \textit{Hicks} makes no claim that it modifies or overrules \textit{Montana}”); see also \textit{Elliott v. White Mtn. Apache Tribal Court}, 566 F.3d 842, 850 (9th Cir. 2009) (acknowledging “the Supreme Court’s instruction that ownership of the land may be dispositive in some cases” concerning the extent of a tribe’s regulatory jurisdiction over a non-Indian and explicitly rejecting the argument that \textit{Hicks} forecloses tribal court jurisdiction over non-Indians on tribal land).

[6] To summarize, Supreme Court and Ninth Circuit precedent, as well as the principle that only Congress may limit a tribe’s sovereign authority, suggest that \textit{Hicks} is best understood as the narrow decision it explicitly claims to be. See \textit{Hicks}, 533 U.S. at 358 n.2. Its application of \textit{Montana} to a jurisdictional question arising on tribal land should apply only when the specific concerns at issue in that case exist. Because none of those circumstances exist here, we must follow precedent that limits \textit{Montana} to cases arising on non-Indian land. Doing otherwise would impermissibly broaden \textit{Montana}’s scope beyond what any precedent requires and restrain tribal sovereign authority despite Congress’s clearly stated federal interest in promoting tribal self-government. See \textit{Mescalero Apache Tribe}, 462 U.S. at 335-36 (recognizing that as a “necessary implication” of Congress’s broad commitment to further tribal self-government, “tribes have the power to manage
the use of [their] territory and resources by both members and nonmembers, to undertake and regulate economic activity within the reservation, and to defray the cost of governmental services by levying taxes” (internal citations omitted)). We therefore hold that the CRIT has regulatory jurisdiction over Water Wheel and Johnson for claims arising from their activities on tribal land, independent of Montana.

[7] In this instance, where the non-Indian activity in question occurred on tribal land, the activity interfered directly with the tribe’s inherent powers to exclude and manage its own lands, and there are no competing state interests at play, the tribe’s status as landowner is enough to support regulatory jurisdiction without considering Montana. Finding otherwise would contradict Supreme Court precedent establishing that land ownership may sometimes be dispositive and would improperly limit tribal sovereignty without clear direction from Congress.

B

[8] Since deciding Montana, the Supreme Court has specified limits to the extent of a tribe’s adjudicative jurisdiction over non-Indians three times: first in Strate, then in Hicks, and most recently in Plains Commerce Bank. In all three cases, the Court articulated the general rule that a tribe’s adjudicative jurisdiction may not exceed its regulatory jurisdiction, and in all three cases the Court found the tribe lacked regulatory, and therefore adjudicative, authority. The Supreme Court has not yet considered the question of adjudicative authority where regulatory jurisdiction exists. However, it is clear that the general rule announced in Strate, and confirmed in Hicks and Plains Commerce Bank, that adjudicative jurisdiction is confined by the bounds of a tribe’s regulatory jurisdiction, applies. Beyond that, because the Supreme Court has repeatedly recognized that only Congress may restrict a tribe’s inherent sovereignty, we must consider the question of the CRIT’s adjudicative jurisdiction without contradicting the
rules that have long governed tribes’ civil authority over non-Indians on tribal land.

Because the CRIT has regulatory jurisdiction, there is no danger that recognizing adjudicative jurisdiction would conflict with *Strate*, *Hicks*, or *Plains Commerce Bank*. Water Wheel, Johnson, and the district court erroneously point to *Philip Morris USA, Inc. v. King Mountain Tobacco Co., Inc.*, 569 F.3d 932 (9th Cir. 2009), for the proposition that *Montana* applies to questions of a tribe’s adjudicative authority. In *Philip Morris* we determined that the Yakama Tribe lacked regulatory, and therefore adjudicative, jurisdiction over non-Indian corporation Philip Morris regarding federal trademark registration. 569 F.3d at 945 (Fletcher, W., J., concurring); see also id. at 942.

[9] In reaching its conclusion, the panel articulated its understanding of the rules for determining both regulatory and adjudicative jurisdiction. It cited *Hicks*, *Montana*, and *Strate* for the proposition that a tribe’s adjudicative authority does not exceed its regulatory authority. Id. at 939. It then stated that “[t]he *Montana* framework is applicable to tribal adjudicative jurisdiction, which extends no further than the *Montana* exceptions,” id, and that “in this circuit, the *Montana* analysis is controlling in tribal jurisdiction cases.” Id. at 941. But Water Wheel’s and Johnson’s’s suggestion that these statements require us to apply *Montana* to the question of adjudicative jurisdiction is unconvincing when considered against context and controlling precedent.

The majority’s statement in *Phillip Morris* that *Montana* applies to questions of adjudicative jurisdiction only aligns with Supreme Court precedent if interpreted as saying that to determine whether adjudicative jurisdiction exists, a court must first determine whether regulatory jurisdiction exists. *See Hicks*, 533 U.S. at 357, 374 (analyzing regulatory jurisdiction first, then determining that because the tribe lacked regulatory jurisdiction it necessarily lacked adjudicative juris-
Thus, if Montana applies to the question of regulatory jurisdiction, it necessarily limits the court’s inquiry into adjudicative jurisdiction because the Supreme Court has held that a tribe’s adjudicative jurisdiction may not exceed its regulatory jurisdiction. Philip Morris did not and could not overrule McDonald, where the Ninth Circuit expressly rejected the argument that Hicks applies to tribal land outside the specific circumstances that existed in that case, and it could not overrule Supreme Court precedent establishing and confirming the rule that Montana’s analysis applies specifically to non-Indian land. For those reasons, Philip Morris’s comments regarding jurisdiction are best understood as a reiteration of the Supreme Court’s rule that a tribe’s adjudicative jurisdiction may not exceed its regulatory jurisdiction.

Furthermore, Philip Morris did not involve a question related to the tribe’s authority to exclude or its interest in managing its own land. To the contrary, the activity in question occurred off reservation. The tribal court clearly lacked jurisdiction and, arguably, Montana did not even apply because there the Court considered a tribe’s regulatory jurisdiction over activities on non-Indian fee land within the reservation, not beyond the reservation’s borders where the tribe lacked authority to regulate a non-Indian. Atkinson Trading Co., 532 U.S. at 657 n.12 (observing that except in limited circumstances, “there can be no assertion of civil authority beyond tribal lands”); see Philip Morris, 569 F.3d at 945-46 (Fletcher, W., J., concurring) (noting that the panel majority’s opinion answers a simple and straightforward question with “an extended opinion containing a great deal of dicta”).

Because recognizing adjudicative jurisdiction would not conflict with the rule articulated in Strate, Hicks, and Plains
Commerce Bank, we consider whether recognizing adjudicative jurisdiction would conflict with earlier precedent. Prior to Hicks, the general rule for adjudicative authority over the conduct of non-Indians on tribal land was that tribes had jurisdiction. See Iowa Mut. Ins. Co., 480 U.S. at 18 (observing that a tribe’s inherent civil jurisdiction over non-Indian activities on the reservation should be presumed unless Congress has said otherwise); Santa Clara Pueblo, 436 U.S. at 65 (“Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.”); Williams v. Lee, 358 U.S. 217, 220 (1959) (recognizing the traditional rule that if a crime occurs within a reservation “by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive,” and accordingly upholding exclusive tribal court jurisdiction over an action brought by a non-Indian against an Indian for an on-reservation debt).

The Supreme Court recently reaffirmed those long-standing principles when it recognized the general rule that a tribe has plenary jurisdiction over tribal land until or unless that land is converted to non-Indian land. See Plains Commerce Bank, 554 U.S. at 328 (“Our cases have made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it.”); see also Bourland, 508 U.S. at 689 (recognizing that the change in land status from Indian to non-Indian abrogates the tribe’s power to exclude and “implies the loss of regulatory jurisdiction over the use of the land by others”).

[11] Here, the land is tribal land and the tribe has regulatory jurisdiction over Water Wheel and Johnson. While it is an open question as to whether a tribe’s adjudicative jurisdiction is equal to its regulatory jurisdiction, the important sovereign interests at stake, the existence of regulatory jurisdiction, and long-standing Indian law principles recognizing tribal sovereignty all support finding adjudicative jurisdiction here. Any other conclusion would impermissibly interfere with the
tribe’s inherent sovereignty, contradict long-standing principles the Supreme Court has repeatedly recognized, and conflict with Congress’s interest in promoting tribal self-government. Accordingly, we hold that in addition to regulatory jurisdiction, the CRIT has adjudicative jurisdiction over both Water Wheel and Johnson.8

C

Montana does not apply to this case. However, because we disagree not only with the district court’s application of the case in the first place, but also with its interpretation of the case as it applies to Johnson, we briefly explain why, even if Montana applied, the tribe would have subject matter jurisdiction.

Water Wheel and Johnson propose that Montana’s first exception requires a consensual relationship and that the relationship between the defendants and the tribe was not consen-

8The district court correctly rejected Water Wheel’s argument that the CRIT waived tribal jurisdiction. Water Wheel’s rights under the lease terminated when it expired in 2007. Nevertheless, the corporation relies on a parsed reading of the lease concerning the Secretary of the Interior’s powers to enforce its provisions. The cited language does not constitute a clear and unmistakable waiver of the CRIT’s sovereign power. See Merrion, 455 U.S. at 148; Ariz. Public Serv. Co. v. ASPAAS, 77 F.3d 1128, 1135 (9th Cir. 1995).

Water Wheel also fails in arguing that (1) BIA regulations preclude tribal court jurisdiction and (2) its notice to the BIA of tribal harassment triggered the equivalent of a dispute resolution process that negates the tribe’s authority to evict. Nothing in the BIA regulations limits what the tribe can do and the regulations specifically recognize that tribes may invoke remedies available to them under a lease. 25 C.F.R. § 162.619(a)(3). Furthermore, the “extent of the BIA’s policing of Indian leases is to ensure that the lessees, whether Indian or non-Indian, fulfill their contractual obligations . . . it has no statutory or regulatory authority to take action against an Indian lessor. Such actions must be brought in tribal or federal court.” Hawley Lake Homeowners’ Ass’n v. Deputy Assistant Sec’y, 13 IBIA 276, 289 (1985).
They also suggest that we may not consider the second Montana exception because the tribe failed to argue that exception before the district court. As an initial matter, we disagree that the tribal parties waived their arguments regarding the second Montana exception. They sufficiently preserved both jurisdictional grounds, on which the tribal courts expressly relied in reaching their decisions and which the tribal parties raised in their district court brief. See O’Rourke v. Seaboard Surety Co., 887 F.2d 955, 957 (9th Cir. 1989) (“There is no bright-line rule to determine whether a matter has been properly raised. A workable standard, however, is that the argument must be raised sufficiently for the trial court to rule on it.” (internal citations omitted)).

Regarding claims related to Water Wheel, the district court correctly found that the corporation’s long-term business lease with the CRIT for the use of prime tribal riverfront property established a consensual relationship and that the tribe’s eviction action bears a close nexus to that relationship. The corporation had full knowledge that the leased land was tribal property and that under the lease’s terms, CRIT laws and regulations applied to the land and Water Wheel’s operations. The tribe clearly had authority to regulate the corporation’s activities under Montana’s first exception and—considering that the business also involved the use of tribal land and that the business venture itself constituted a significant economic interest for the tribe—under the second exception as well. Montana, 450 U.S. at 565.

The district court then considered whether Johnson’s personal twenty-two-year relationship with the CRIT was subjectively voluntary and consensual under Montana’s first exception. The court erred in applying a subjective test to the

\*To assess Johnson’s subjective understanding of his relationship with the tribe, the district court improperly relied on the Second Declaration of Robert Johnson, which was not before the tribal court. See Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985). Because
question of subject matter jurisdiction, which is not required under *Montana* or its federal common law progeny, and is irrelevant to resolving subject matter jurisdiction over a tort claim. The Supreme Court has indicated that tribal jurisdiction depends on what non-Indians “reasonably” should “anticipate” from their dealings with a tribe or tribal members on a reservation. *Plains Commerce Bank*, 554 U.S. at 338.

Regarding the tribe’s regulatory jurisdiction over the breach of contract claim against Johnson personally, Johnson argues the tribe lacks jurisdiction because any relationship he entered into was on behalf of the corporation and not himself. To support his position, Johnson cites *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 348 (1985) (“As an inanimate entity, a corporation must act through agents.”). Outside of the Indian law context, this argument is often couched in terms of the “fiduciary shield rule” doctrine, an equitable doctrine courts sometimes use to insulate corporate employees acting in their official capacities from personal jurisdiction in a distant forum. Robert A. Koenig, *Personal Jurisdiction and the Corporate Employee: Minimum Contacts Meet the Fiduciary Shield*, 38 Stan. L. Rev. 813, 813, 818 (1986). In that context, the Supreme Court has rejected mechanical application of the rule and instructed that courts should consider the circumstances to determine whether a defendant should “reasonably anticipate being haled into court” in the forum state. *Calder v. Jones*, 465 U.S. 783, 790 (1984) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). Specifically, courts should consider “the relationship among the defendant, the forum, and the litigation.” *Keeton v. Hustler Magazine, Inc.*,
Subject matter jurisdiction, on the other hand, concerns the authority of a court to hear cases of a particular subject matter and usually has nothing to do with the individual actions of the parties. But under Montana's first exception, a tribe's exercise of subject matter jurisdiction over a non-Indian defendant depends on the existence of a "consensual relationship" between the non-Indian defendant and the tribe or its members. Thus, the nature and extent of an individual defendant's actions come into play.

We have recognized that the "jurisprudential contours of what reasons suffice for the court to disregard the corporate form for jurisdictional purposes are somewhat indistinct." Davis v. Metro Prods., Inc., 885 F.2d 515, 520 (9th Cir. 1989). Nevertheless, we have held that "the corporate form may be ignored" in cases where the corporation is the "alter ego" of the defendant, or where there is an "identity of interests" between the corporation and the individual. Id. at 520-21.

In this case, it is a matter of established fact that Johnson was Water Wheel's "alter ego" and, thus, "corporate separateness is illusory." Katzir's Floor and Home Design, Inc. v. M-MLS.com, 394 F.3d 1143, 1149 (9th Cir. 2004). Any actions Johnson took on behalf of Water Wheel, he also took on behalf of himself. We therefore consider whether Johnson as an individual entered into a consensual relationship with the tribe, without regard to any protections the corporate form might otherwise offer.

For purposes of determining whether a consensual relationship exists under Montana's first exception, consent may be established "expressly or by [the nonmember's] actions." Plains Commerce Bank, 554 U.S. at 337. There is no requirement that Johnson's commercial dealings with the CRIT be a
matter of written contract or lease actually signed by Johnson. See Montana, 450 U.S. at 565 (tribes may regulate the activities of nonmembers who enter into “commercial dealing, contracts, leases, or other arrangements” (emphasis added)). We are to consider the circumstances and whether under those circumstances the non-Indian defendant should have reasonably anticipated that his interactions might “trigger” tribal authority. Id. at 338.

Johnson owned and operated Water Wheel on tribal land for more than twenty years and had extensive dealings with the CRIT before the lease expired. Additionally, Johnson was on notice through the leases’s explicit terms that Water Wheel, its agents, and employees were subject to CRIT laws, regulations, and ordinances. These facts adequately support the tribal court’s conclusion that Johnson had entered into a consensual relationship with the tribe and could reasonably anticipate that the tribe would exercise its jurisdictional authority. Johnson’s subjective beliefs regarding his relationship with the tribe do not change the consensual nature of that relationship for purposes of regulatory jurisdiction. Moreover, the tribe’s claims for unpaid rent and related damages arose directly from this relationship.

As noted above, the commercial dealings between the tribe and Johnson involved the use of tribal land, one of the tribe’s most valuable assets. Thus, if Montana applied to the breach of contract claim, either exception would provide regulatory jurisdiction over Johnson.

As for the trespass claim, there is no legal or logical basis to require a consensual relationship between a trespasser and the offended landowner. This is particularly true when the trespass is to tribal land, the offended owner is the tribe, and the trespasser is not a tribal member. Merrion, 455 U.S. at 144. If tribes lacked authority to evict holdover tenants and their agents, tribes would be discouraged from entering into
financially beneficial leases with nonmembers for fear of losing control over tribal land.

Evaluating the trespass claim under Montana’s second exception, unpaid rent and percentages of the business’s gross receipts here totaled $1,486,146.42 at the time of the tribal court’s judgment. Johnson’s unlawful occupancy and use of tribal land not only deprived the CRIT of its power to govern and regulate its own land, but also of its right to manage and control an asset capable of producing significant income. Thus, in addition to the tribe’s undisputed authority to eject trespassers from its own land, Montana’s second exception would provide regulatory jurisdiction.

[12] Our analysis of adjudicative jurisdiction, see supra Part III.B, applies once regulatory jurisdiction is established under Montana, and, accordingly, the tribe would have both regulatory and adjudicative jurisdiction over Water Wheel and Johnson even if Montana applied.

IV

[13] To exercise civil authority over a defendant, a tribal court must have both personal jurisdiction and subject matter jurisdiction. See 18 William Meade Fletcher, Fletcher Cyclopediad of the Law of Corporations § 8644.50 (rev. perm. ed., 2006) (“Personal jurisdiction is, of course, distinguishable from subject matter jurisdiction.”); see also Cohen § 7.02[2], 604 (“For a tribal court to hear a case, it must have not only subject matter jurisdiction under both tribal and federal law, but also personal jurisdiction over the defendant.”). One of the most “firmly established principles of personal jurisdiction” is that personal jurisdiction exists over defendants physically present in the forum state. Burnham v. Superior Court, 495 U.S. 604, 610 (1990). In-state personal service also serves as a basis for personal jurisdiction. Id. at 615-16.

[14] Johnson lived on tribal land, which on its own serves as a basis for personal jurisdiction. Additionally, he was
served with tribal process at the Water Wheel location on tribal land, and that service within the tribal court’s territorial jurisdiction is also sufficient to confer personal jurisdiction. We therefore hold that the tribal court has personal jurisdiction over Johnson.

To the extent Johnson argues that the fiduciary shield rule prevents the tribal court from exercising personal jurisdiction over him, his argument fails. Assuming the fiduciary shield rule applies to defendants present in the forum state, it would not protect Johnson, an “alter ego” to Water Wheel. See Katzir’s Floor & Home Design, Inc., 394 F.3d at 1149; see also Keeton, 465 U.S. at 781 n.13 (“[W]e today reject the suggestion that employees who act in their official capacity are somehow shielded from suit in their individual capacity. . . . Each defendant’s contacts with the forum State must be assessed individually.”) (citing Calder, 465 U.S. at 790). Furthermore, courts have held that jurisdiction over a corporate agent is proper where the agent was not faithfully pursuing corporate interests. See Koenig, supra, at 824-25.

Absent the fiduciary shield, a court may exercise personal jurisdiction over a defendant where that defendant has sufficient minimum contacts with the forum state such that the suit does not offend “traditional notions of fair play and substantial justice.” Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). In his role as president and owner of the corporation, Johnson failed to pay rent and receipts owed to the tribe pursuant to the lease and failed to surrender the property peacefully. He also failed to adhere to corporate formalities in that he had, among other things, commingled personal and business funds, failed to maintain separate financial records, and borrowed and used Water Wheel funds for his personal use and the use of third persons, instead of paying the CRIT.

Johnson had notice through the lease that, as an agent of Water Wheel, he was subject to CRIT laws, regulations, and ordinances. He lived and operated a business on the tribe’s
land within its reservation for more than twenty years. Certainly it was reasonable to anticipate that he could be haled into tribal court. The tribal court properly found personal jurisdiction over Johnson for the claims related to unpaid rent due under the lease and for attorney’s fees.

[15] As for damages related to his unlawful trespass, for more than nineteen months after the lease expired Johnson continued unauthorized operation of a business on tribal land, collected rents, and paid absolutely nothing to the tribe. The tribal court had personal jurisdiction over Johnson for purposes of the trespass claim and damages arising from that violation. See Calder, 465 U.S. at 790.

[16] Johnson clearly had sufficient minimum contacts with the CRIT and its tribal land to satisfy considerations of fairness and justice. Int’l Shoe Co., 326 U.S. at 316; see also Davis, 885 F.2d 515, 520 (9th Cir. 1989). That he acted unlawfully and wrongfully on behalf of a corporation is no defense. Calder, 465 U.S. at 790.

V

The judgment of the district court is AFFIRMED as to Water Wheel Camp Recreational Area, Inc., and REVERSED with respect to Robert Johnson. The district court’s order directing the tribal court to vacate its judgment against Robert Johnson and to cease any litigation concerning Robert Johnson personally is VACATED. The case is REMANDED for entry of judgment upholding the tribal court’s jurisdiction. Costs are awarded to the tribal parties.

10 The CRIT’s motion for judicial notice also includes documents outside the tribal court record and is therefore denied. See supra note 9.

Chief Justice Marshall delivered the opinion of the Court.

This cause, in every point of view in which it can be placed, is of the deepest interest.

The defendant is a state, a member of the union, which has exercised the powers of government over a people who deny its jurisdiction, and are under the protection of the United States.

The plaintiff is a citizen of the state of Vermont, condemned to hard labour for four years in the penitentiary of Georgia; under colour of an act which he alleges to be repugnant to the constitution, laws, and treaties of the United States.

The legislative power of a state, the controlling power of the constitution and laws of the United States, the rights, if they have any, the political existence of a once numerous and powerful people, the personal liberty of a citizen, are all involved in the subject now to be considered. . . .

The indictment charges the plaintiff in error, and others, being white persons, with the offence of ‘residing within the limits of the Cherokee Nation without a license,’ and ‘without having taken the oath to support and defend the constitution and laws of the state of Georgia.’

The indictment and plea in this case draw in question, we think, the validity of the treaties made by the United States with the Cherokee Indians; if not so, their construction is certainly drawn in question; and the decision has been, if not against their validity, ‘against the right, privilege or exemption, specially set up and claimed under them.’ They also draw into question the validity of a statute of the state of Georgia, ‘on the ground of its being repugnant to the constitution, treaties and laws of the United States, and the decision is in favour of its validity.’

It is, then, we think, too clear for controversy, that the act of congress, by which this court is constituted, has given it the power, and of course imposed on it the duty, of exercising jurisdiction in this case. This duty, however unpleasant, cannot be avoided. Those who fill the judicial department have no discretion in selecting the subjects to be brought before them. We must examine the defence set up in this plea. We must inquire and decide whether the act of the legislature of Georgia, under which the plaintiff in error has been prosecuted and condemned, be consistent with, or repugnant to, the constitution, laws and treaties of the United States.

It has been said at the bar, that the acts of the legislature of Georgia seize on the whole Cherokee country, parcel it out among the neighbouring counties of the state, extend her code over the whole country, abolish its institutions and its laws, and annihilate its political existence.

If this be the general effect of the system, let us inquire into the effect of the particular statute and section on which the indictment is founded.

It enacts that ‘all white persons, residing within the limits of the Cherokee Nation on the 1st day of March next, or at any time thereafter, without a license or permit from his excellency the governor, or from such agent as his excellency the governor shall authorise to grant such permit or license, and who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeanour, and, upon conviction thereof, shall be punished by confinement to the penitentiary, at hard labour, for a term not less than four years.’

The eleventh section authorises the governor, should he deem it necessary for the protection of the mines, or the enforcement of the laws in force within the Cherokee Nation, to raise and organize a guard,’ &c.

The thirteenth section enacts, ‘that the said guard or any member of them, shall be, and they are hereby authorised and empowered to arrest any person legally charged with or detected in a violation of the laws of this state, and to convey, as soon as practicable, the
person so arrested, before a justice of the peace, judge of the superior, or justice of inferior court of this state, to be dealt with according to law.’

The extra-territorial power of every legislature being limited in its action, to its own citizens or subjects, the very passage of this act is an assertion of jurisdiction over the Cherokee Nation, and of the rights and powers consequent on jurisdiction.

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.

After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous sons into this western world. They found it in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting, and fishing.

Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturists and manufacturers?

But power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin; because holding it in our recollection might shed some light on existing pretensions.

The relation between the Europeans and the natives was determined in each case by the particular government which asserted and could maintain this preemptive privilege in the particular place. The United States succeeded to all the claims of Great Britain, both territorial and political; but no attempt, so far as is known, has been made to enlarge them. So far as they existed merely in theory, or were in their nature only exclusive of the claims of other European nations, they still retain their original character, and remain dormant. So far as they have been practically exerted, they exist in fact, are understood by both parties, are asserted by the one, and admitted by the other.

Soon after Great Britain determined on planting colonies in America, the king granted charters to companies of his subjects who associated for the purpose of carrying the views of the crown into effect, and of enriching themselves. The first of these charters was made before possession was taken of any part of the country. They purport, generally, to convey the soil, from the Atlantic to the South Sea. This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The crown could not be understood to grant what the crown did not affect to claim; nor was it so understood.

The charter to Georgia professes to be granted for the charitable purpose of enabling poor subjects to gain a comfortable subsistence by cultivating lands in the American provinces, ‘at present waste and desolate.’ It recites: ‘and whereas our provinces in North America have been frequently ravaged by Indian enemies, more especially that of South Carolina, which, in the late war by the neighbouring savages, was laid waste by fire and sword, and great numbers of the English inhabitants miserably massacred; and our loving subjects, who now inhabit there, by reason of the smallness of their numbers, will, in case of any new war, be exposed to the like calamities, inasmuch as their whole southern frontier continueth unsettled, and lieth open to the said savages.’

The charters contain passages showing one of their objects to be the civilization of the Indians, and their
conversion to Christianity—objects to be accomplished by conciliatory conduct and good example; not by extermination.

The actual state of things, and the practice of European nations, on so much of the American continent as lies between the Mississippi and the Atlantic, explain their claims, and the charters they granted. Their pretensions unavoidably interfered with each other; though the discovery of one was admitted by all to exclude the claim of any other, the extent of that discovery was the subject of unceasing contest. Bloody conflicts arose between them, which gave importance and security to the neighbouring nations. Fierce and warlike in their character, they might be formidable enemies, or effective friends. Instead of rousing their resentments, by asserting claims to their lands, or to dominion over their persons, their alliance was sought by flattering professions, and purchased by rich presents. The English, the French, and the Spaniards, were equally competitors for their friendship and their aid. Not well acquainted with the exact meaning of words, nor supposing it to be material whether they were called the subjects, or the children of their father in Europe; lavish in professions of duty and affection, in return for the rich presents they received; so long as their actual independence was untouched, and their right to self government acknowledged, they were willing to profess dependence on the power which furnished supplies of which they were in absolute need, and restrained dangerous intruders from entering their country: and this was probably the sense in which the term was understood by them.

Certain it is, that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self government, so far as respected themselves only.

The proclamation issued by the king of Great Britain, in 1763, soon after the ratification of the articles of peace, forbids the governors of any of the colonies to grant warrants of survey, or pass patents upon any lands whatever, which, not having been ceded to, or purchased by, us (the king), as aforesaid, are reserved to the said Indians, or any of them.

The proclamation proceeds: 'and we do further declare it to be our royal will and pleasure, for the present, as aforesaid, to reserve, under our sovereignty, protection, and dominion, for the use of the said Indians, all the lands and territories lying to the westward of the sources of the rivers which fall into the sea, from the west and northwest as aforesaid: and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our special leave and license for that purpose first obtained. And we do further strictly enjoin and require all persons whatever, who have, either wilfully or inadvertently, seated themselves upon any lands within the countries above described, or upon any other lands which, not having been ceded to, or purchased by us, are still reserved to the said Indians, as aforesaid, forthwith to remove themselves from such settlements.'

A proclamation, issued by Governor Gage, in 1772, contains the following passage: 'whereas many persons, contrary to the positive orders of the king, upon this subject, have undertaken to make settlements beyond the boundaries fixed by the treaties made with the Indian nations, which boundaries ought to serve as a barrier between the whites and the said nations; particularly on the Ouabache.' The proclamation orders such persons to quit those countries without delay.

Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans; such her claims, and such her practical exposition of the charters she had granted: she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged.

This was the settled state of things when the war of our revolution commenced. The influence of our enemy was established; her resources enabled her to keep up that influence; and the colonists had much cause for the apprehension that the Indian nations would, as the allies of Great Britain, add their arms to hers. This, as was to be expected, became an object of great solicitude to congress. Far from advancing a
claim to their lands, or asserting any right of domin-
ion over them, congress resolved ‘that the securing
and preserving the friendship of the Indian nations
appears to be a subject of the utmost moment to these
colonies.’

The early journals of congress exhibit the most
anxious desire to conciliate the Indian nations. Three
Indian departments were established; and commis-
sioners appointed in each, ‘to treat with the Indians
in their respective departments, in the name and on
the behalf of the United Colonies, in order to pre-
serve peace and friendship with the said Indians,
and to prevent their taking any part in the present
commotions.’

The most strenuous exertions were made to pro-
cure those supplies on which Indian friendships were
supposed to depend; and every thing which might
excite hostility was avoided . . .

During the war of the revolution, the Cherokees
took part with the British. After its termination, the
United States, though desirous of peace, did not feel
its necessity so strongly as while the war continued.
Their political situation being changed, they might
very well think it advisable to assume a higher tone,
and to impress on the Cherokees the same respect
for congress which was before felt for the king of
Great Britain. This may account for the language of
the treaty of Hopewell. There is the more reason for
supposing that the Cherokee chiefs were not very
critical judges of the language, from the fact that
every one makes his mark; no chief was capable of
signing his name. It is probable the treaty was inter-
preted to them.

The treaty is introduced with the declaration, that
‘the commissioners plenipotentiary of the United
States give peace to all the Cherokees, and receive
them into the favour and protection of the United
States of America, on the following conditions.’

When the United States gave peace, did they not
also receive it? Were not both parties desirous of it?
If we consult the history of the day, does it not
inform us that the United States were at least as anx-
ious to obtain it as the Cherokees? We may ask,
further: did the Cherokees come to the seat of the
American government to solicit peace; or, did the
American commissioners go to them to obtain it?
The treaty was made at Hopewell, not at New York.
The word ‘give,’ then, has no real importance
attached to it.

The first and second articles stipulate for the mu-
tual restoration of prisoners, and are of course equal.

The third article acknowledges the Cherokees to
be under the protection of the United States of
America, and of no other power.

This stipulation is found in Indian treaties, gen-
erally. It was introduced into their treaties with
Great Britain; and may probably be found in those
with other European powers. Its origin may be
traced to the nature of their connexion with those
powers; and its true meaning is discerned in their
relative situation.

The general law of European sovereigns, respect-
ing their claims in America, limited the intercourse
of Indians, in a great degree, to the particular poten-
tate whose ultimate right of domain was acknowl-
edged by the others. This was the general state of
things in time of peace. It was sometimes changed in
war. The consequence was, that their supplies were
derived chiefly from that nation, and their trade con-
fined to it. Goods, indispensable to their comfort, in
the shape of presents, were received from the same
hand. What was of still more importance, the strong
hand of government was interposed to restrain the
disorderly and licentious from intrusions into their
country, from encroachments on their lands, and
from those acts of violence which were often
attended by reciprocal murder. The Indians per-
ceived in this protection only what was beneficial to
themselves—an engagement to punish aggressions
on them. It involved, practically, no claim to their
lands, no dominion over their persons. It merely
bound the nation to the British crown, as a dependent
ally, claiming the protection of a powerful friend and
neighbour, and receiving the advantages of that pro-
tection, without involving a surrender of their na-
tional character.

This is the true meaning of the stipulation, and is
undoubtedly the sense in which it was made. Neither
the British government, nor the Cherokees, ever un-
derstood it otherwise.

The same stipulation entered into with the United
States, is undoubtedly to be construed in the same
manner. They receive the Cherokee Nation into their
favor and protection. The Cherokees acknowledge
themselves to be under the protection of the United
States, and of no other power. Protection does not
imply the destruction of the protected. The manner
in which this stipulation was understood by the
American government, is explained by the language
and acts of our first president.

The fourth article draws the boundary between
the Indians and the citizens of the United States. But,
in describing this boundary, the term ‘allotted’ and the term ‘hunting ground’ are used. . . .

So with respect to the words ‘hunting grounds.’ Hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed, that any intention existed of restricting the full use of the lands they reserved.

To the United States, it could be a matter of no concern, whether their whole territory was devoted to hunting grounds, or whether an occasional village, and an occasional corn field, interrupted, and gave some variety to the scene.

These terms had been used in their treaties with Great Britain, and had never been misunderstood. They had never been supposed to imply a right in the British government to take their lands, or to interfere with their internal government.

The fifth article withdraws the protection of the United States from any citizen who has settled, or shall settle, on the lands allotted to the Indians, for their hunting grounds; and stipulates that, if he shall not remove within six months the Indians may punish him.

The sixth and seventh articles stipulate for the punishment of the citizens of either country, who may commit offences on or against the citizens of the other. The only inference to be drawn from them is, that the United States considered the Cherokees as a nation.

The ninth article is in these words: ‘for the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens of the other. The only inference to be drawn from them is, that the United States considered the Cherokees as a nation.

The ninth article is in these words: ‘for the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens of the other. The only inference to be drawn from them is, that the United States considered the Cherokees as a nation.

The sixth and seventh articles stipulate for the punishment of the citizens of either country, who may commit offences on or against the citizens of the other. The only inference to be drawn from them is, that the United States considered the Cherokees as a nation.

The ninth article is in these words: ‘for the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens of the other. The only inference to be drawn from them is, that the United States considered the Cherokees as a nation.

To construe the expression ‘managing all their affairs,’ into a surrender of self-government, would be, we think, a perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them. The great subject of the article is the Indian trade. The influence it gave, made it desirable that congress should possess it. The commissioners brought forward the claim, with the profession that their motive was ‘the benefit and comfort of the Indians, and the prevention of injuries or oppressions.’ This may be true, as respects the regulation of their trade, and as respects the regulation of all affairs connected with their trade, but cannot be true, as respects the management of all their affairs. The most important of these are the cession of their lands, and security against intruders on them. Is it credible that they should have considered themselves as surrendering to the United States the right to dictate their future cessions and the terms on which they should be made? or to compel their submission to the violence of disorderly and licentious intruders? It is equally inconceivable that they could have supposed themselves, by a phrase thus slipped into an article, on another and most interesting subject, to have divested themselves of the right of self-government on subjects not connected with trade. Such a measure could not be ‘for their benefit and comfort,’ or for ‘the prevention of injuries and oppression.’ Such a construction would be inconsistent with the spirit of this and of all subsequent treaties; especially of those articles which recognise the right of the Cherokees to declare hostilities, and to make war. It would convert a treaty of peace covertly into an act, annihilating the political existence of one of the parties. Had such a result been intended, it would have been openly avowed.

This treaty contains a few terms capable of being used in a sense which could not have been intended at the time, and which is inconsistent with the practical construction which has always been put on them; but its essential articles treat the Cherokees as a nation capable of maintaining the relations of peace and war; and ascertain the boundaries between them and the United States. . . .

This treaty, thus explicitly recognizing the national character of the Cherokees, and their right of self government; thus guaranteeing their lands; assuming the duty of protection, and of course pledging the faith of the United States for that protection; has been frequently renewed, and is now in full force.

To the general pledge of protection have been added several specific pledges, deemed valuable by the Indians. Some of these restrain the citizens of the United States from encroachments on the Cherokee country, and provide for the punishment of intruders.

From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is
exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States.

The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union. Is this the rightful exercise of power, or is it usurpation?

While these states were colonies, this power, in its utmost extent, was admitted to reside in the crown. When our revolutionary struggle commenced, congress was composed of an assemblage of deputies acting under specific powers granted by the legislatures, or conventions of the several colonies. It was a great popular movement, not perfectly organized; nor were the respective powers of those who were entrusted with the management of affairs accurately defined. The necessities of our situation produced a general conviction that those measures which concerned all, must be transacted by a body in which the representatives of all were assembled, and which could command the confidence of all: congress, therefore, was considered as invested with all the powers of war and peace, and congress dissolved our connexion with the mother country, and declared these United Colonies to be independent states. Without any written definition of powers, they employed diplomatic agents to represent the United States at the several courts of Europe; offered to negotiate treaties with them, and did actually negotiate treaties with France. From the same necessity, and on the same principles, congress assumed the management of Indian affairs; first in the name of these United Colonies; and, afterwards, in the name of the United States. Early attempts were made at negotiation, and to regulate trade with them. These not proving successful, war was carried on under the direction, and with the forces of the United States, and the efforts to make peace, by treaty, were earnest and incessant. The confederation found congress in the exercise of the same powers of peace and war, in our relations with Indian nations, as will those of Europe.

Such was the state of things when the confederation was adopted. That instrument surrendered the powers of peace and war to congress, and prohibited them to the states, respectively, unless a state be actually invaded, ‘or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of delay till the United States in congress assembled can be consulted.’ This instrument also gave the United States in congress assembled the sole and exclusive right of ‘regulating the trade and managing all the affairs with the Indians, not members of any of the states: provided, that the legislative power of any state within its own limits be not infringed or violated.’

The correct exposition of this article is rendered unnecessary by the adoption of our existing constitution. That instrument confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions. The shackles imposed on this power, in the confederation, are discarded.

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term ‘nation,’ so generally applied to them, means ‘a people distinct from others.’ The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words ‘treaty’ and ‘nation’ are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

The actual state of things at the time, and all history since, explain these charters; and the king of Great Britain, at the treaty of peace, could cede only what belonged to his crown. These newly asserted titles can derive no aid from the articles so often
repeated in Indian treaties; extending to them, first, the protection of Great Britain, and afterwards that of the United States. These articles are associated with others, recognizing their title to self government. The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. ‘Tributary and feudal states,’ says Vattel, ‘do not thereby cease to be sovereign and independent states, so long as self government and sovereign and independent authority are left in the administration of the state.’ At the present day, more than one state may be considered as holding its right of self government under the guarantee and protection of one or more allies.

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. Can this court revise, and reverse it?

If the objection to the system of legislation, lately adopted by the legislature of Georgia, in relation to the Cherokee Nation, was confined to its extraterritorial operation, the objection, though complete, so far as respected mere right, would give this court no power over the subject. But it goes much further. If the review which has been taken be correct, and we think it is, the acts of Georgia are repugnant to the constitution, laws, and treaties of the United States.

They 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, are committed exclusively to the government of the union.

They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia; guaranty to them all the land within their boundary; solemnly pledge the faith of the United States to restrain their citizens from trespassing on it; and recognize the pre-existing power of the nation to govern itself.

They are in equal hostility with the acts of congress for regulating this intercourse, and giving effect to the treaties.

The forcible seizure and abduction of the plaintiff in error, who was residing in the nation with its permission, and by authority of the president of the United States, is also a violation of the acts which authorize the chief magistrate to exercise this authority.

Will these powerful considerations avail the plaintiff in error? We think they will. He was seized, and forcibly carried away, while under guardianship of treaties guarantying the country in which he resided, and taking it under the protection of the United States. He was seized while performing, under the sanction of the chief magistrate of the union, those duties which the humane policy adopted by congress had recommended. He was apprehended, tried, and condemned, under colour of a law which has been shown to be repugnant to the constitution, laws, and treaties of the United States. Had a judgment, liable to the same objections, been rendered for property, none would question the jurisdiction of this court. It cannot be less clear when the judgment affects personal liberty, and inflicts disgraceful punishment, if punishment could disgrace when inflicted on innocence. The plaintiff in error is not less interested in the operation of this unconstitutional law than if it affected his property. He is not less entitled to the protection of the constitution, laws, and treaties of his country.

This point has been elaborately argued and, after deliberate consideration, decided, in the case of Cohens v. The Commonwealth of Virginia, 6 Wheat. 264.

It is the opinion of this court that the judgment of the superior court for the county of Gwinnett, in the state of Georgia, condemning Samuel A. Worcester to hard labour, in the penitentiary of the state of Georgia, for four years, was pronounced by that court under colour of a law which is void, as being repugnant to the constitution, treaties, and laws of the United States, and ought, therefore, to be reversed and annulled.

[The concurring opinion of Justice McLean and the dissenting opinion of Justice Baldwin are not reprinted here.]
Panel Two – Changing Futures

Federal/Tribal Government Relations
Jennifer Hughes, Esq. ‘95
Federal-Tribal Government Relations: Current Efforts

Jennifer P. Hughes

February 22, 2016

I. Federal-Tribal Government Relations: Current Efforts: Administration

a. Richard Nixon, Special Message to Congress, July 8, 1970
b. Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments, November 6, 2000
c. President Barack Obama, Memorandum on Tribal Consultation, November 5, 2009
d. Executive Order 13647 - Establishing the White House Council on Native American Affairs, June 26, 2013
e. White House Tribal Nations Conference
f. Certain Significant Administration Actions
   i. Cobell Settlement and Land Buy-Back Program
   ii. Approving Tribal Leasing Regulations under the HEARTH Act, 25 U.S.C. 415(h) and 25 C.F.R. Part 162
   iv. Generation Indigenous

II. Federal-Tribal Government Relations: Current Efforts: Congress

a. Certain Significant Legislative Actions
   i. Tribal Law and Order Act of 2010, PL 111-211
   ii. Violence Against Women Act Reauthorization Act of 2013, PL 113-4
   iii. Stafford Act Amendments, 42 U.S.C. 5170, PL 113-2, div. B, Section 1110
   iv. DOT Tribal Self-Governance Program - Fixing America’s Surface Transportation Act, PL 114-94
   v. Tribal General Welfare Exclusion Act, PL 113-168

b. Current Legislative Efforts
   i. Tribal Labor Sovereignty Act (H.R. 511 / S. 248)
   ii. Tribal Tax Parity Act (H.R. 3030 from 113th Congress)
   iii. Tribal Homeland Restoration and Protection
   iv. Trust Modernization
Consultation and Coordination With Indian Tribal Governments

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:

Section 1. Definitions. For purposes of this order:

(a) "Policies that have tribal implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

(b) "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

(c) "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

(d) "Tribal officials" means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

Sec. 2. Fundamental Principles. In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

(a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

(b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

(c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

Sec. 3. Policymaking Criteria. In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:
(a) Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

(b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:

(1) encourage Indian tribes to develop their own policies to achieve program objectives;

(2) where possible, defer to Indian tribes to establish standards; and

(3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

Sec. 4. Special Requirements for Legislative Proposals. Agencies shall not submit to the Congress legislation that would be inconsistent with the policy-making criteria in Section 3.

Sec. 5. Consultation. (a) Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:

(1) funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of the regulation,
(A) consulted with tribal officials early in the process of developing the proposed regulation;
(B) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and
(C) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,

(1) consulted with tribal officials early in the process of developing the proposed regulation;

(2) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the
need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

(3) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(d) On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

Sec. 6. Increasing Flexibility for Indian Tribal Waivers.

(a) Agencies shall review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

(c) Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency, or as otherwise provided by law or regulation. If the application for waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.

(d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency.

Sec. 7. Accountability.

(a) In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866 of September 30, 1993, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.

(b) In transmitting proposed legislation that has tribal implications to OMB, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.

(c) Within 180 days after the effective date of this order the Director of OMB and the Assistant to the President for Intergovernmental Affairs shall confer with tribal officials to ensure that this order is being properly and effectively implemented.

Sec. 8. Independent Agencies. Independent regulatory agencies are encouraged to comply with the provisions of this order.

Sec. 9. General Provisions. (a) This order shall supplement but not supersede the requirements contained in Executive Order 12866 (Regulatory Planning and Review), Executive Order 12988 (Civil Justice Reform), OMB Circular A–19, and the Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments.

(b) This order shall complement the consultation and waiver provisions in sections 6 and 7 of Executive Order 13132 (Federalism).

(c) Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments) is revoked at the time this order takes effect.

(d) This order shall be effective 60 days after the date of this order.
Sec. 10. Judicial Review. This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

William Clinton

THE WHITE HOUSE,
November 6, 2000.
Executive Order 13647 of June 26, 2013

Establishing the White House Council on Native American Affairs

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to promote and sustain prosperous and resilient Native American tribal governments, it is hereby ordered as follows:

Section 1. Policy. The United States recognizes a government-to-government relationship, as well as a unique legal and political relationship, with federally recognized tribes. This relationship is set forth in the Constitution of the United States, treaties, statutes, Executive Orders, administrative rules and regulations, and judicial decisions. Honoring these relationships and respecting the sovereignty of tribal nations is critical to advancing tribal self-determination and prosperity.

As we work together to forge a brighter future for all Americans, we cannot ignore a history of mistreatment and destructive policies that have hurt tribal communities. The United States seeks to continue restoring and healing relations with Native Americans and to strengthen its partnership with tribal governments, for our more recent history demonstrates that tribal self-determination—the ability of tribal governments to determine how to build and sustain their own communities—is necessary for successful and prospering communities. We further recognize that restoring tribal lands through appropriate means helps foster tribal self-determination.

This order establishes a national policy to ensure that the Federal Government engages in a true and lasting government-to-government relationship with federally recognized tribes in a more coordinated and effective manner, including by better carrying out its trust responsibilities. This policy is established as a means of promoting and sustaining prosperous and resilient tribal communities. Greater engagement and meaningful consultation with tribes is of paramount importance in developing any policies affecting tribal nations.

To honor treaties and recognize tribes' inherent sovereignty and right to self-government under U.S. law, it is the policy of the United States to promote the development of prosperous and resilient tribal communities, including by:

(a) promoting sustainable economic development, particularly energy, transportation, housing, other infrastructure, entrepreneurial, and workforce development to drive future economic growth and security;

(b) supporting greater access to, and control over, nutrition and healthcare, including special efforts to confront historic health disparities and chronic diseases;

(c) supporting efforts to improve the effectiveness and efficiency of tribal justice systems and protect tribal communities;

(d) expanding and improving lifelong educational opportunities for American Indians and Alaska Natives, while respecting demands for greater tribal control over tribal education, consistent with Executive Order 13592
EO 13647

Title 3—The President

of December 2, 2011 (Improving American Indian and Alaska Native Educational Opportunities and Strengthening Tribal Colleges and Universities); and

(e) protecting tribal lands, environments, and natural resources, and promoting respect for tribal cultures.

Sec. 2. Establishment. There is established the White House Council on Native American Affairs (Council). The Council shall improve coordination of Federal programs and the use of resources available to tribal communities.

Sec. 3. Membership. (a) The Secretary of the Interior shall serve as the Chair of the Council, which shall also include the heads of the following executive departments, agencies, and offices:

(i) the Department of State;
(ii) the Department of the Treasury;
(iii) the Department of Defense;
(iv) the Department of Justice;
(v) the Department of Agriculture;
(vi) the Department of Commerce;
(vii) the Department of Labor;
(viii) the Department of Health and Human Services;
(ix) the Department of Housing and Urban Development;
(x) the Department of Transportation;
(xi) the Department of Energy;
(xii) the Department of Education;
(xiii) the Department of Veterans Affairs;
(xiv) the Department of Homeland Security;
(xv) the Social Security Administration;
(xvi) the Office of Personnel Management;
(xvii) the Office of the United States Trade Representative;
(xviii) the Office of Management and Budget;
(xix) the Environmental Protection Agency;
(xx) the Small Business Administration;
(xxi) the Council of Economic Advisers;
(xxii) the Office of National Drug Control Policy;
(xxiii) the Domestic Policy Council;
(xxiv) the National Economic Council;
(xxv) the Office of Science and Technology Policy;
(xxvi) the Council on Environmental Quality;
(xxvii) the White House Office of Public Engagement and Intergovernmental Affairs;
Executive Orders

EO 13647

(xxviii) the Advisory Council on Historic Preservation;

(xxix) the Denali Commission;

(xcx) the White House Office of Cabinet Affairs; and

(xcxi) such other executive departments, agencies, and offices as the Chair may, from time to time, designate.

(b) A member of the Council may designate a senior-level official, who is a full-time officer or employee of the Federal Government, to perform his or her functions.

(c) The Department of the Interior shall provide funding and administrative support for the Council to the extent permitted by law and within existing appropriations.

(d) The Council shall coordinate its policy development through the Domestic Policy Council.

(e) The Council shall coordinate its outreach to federally recognized tribes through the White House Office of Public Engagement and Intergovernmental Affairs.

(f) The Council shall meet three times a year, with any additional meetings convened as deemed necessary by the Chair.

The Chair may invite other interested agencies and offices to attend meetings as appropriate.

Sec. 4. Mission and Function of the Council. The Council shall work across executive departments, agencies, and offices to coordinate development of policy recommendations to support tribal self-governance and improve the quality of life for Native Americans, and shall coordinate the United States Government's engagement with tribal governments and their communities.

The Council shall:

(a) make recommendations to the President, through the Director of the Domestic Policy Council, concerning policy priorities, including improving the effectiveness of Federal investments in Native American communities, where appropriate, to increase the impact of Federal resources and create greater opportunities to help improve the quality of life for Native Americans;

(b) coordinate, through the Director of the Office of Public Engagement and Intergovernmental Affairs, Federal engagement with tribal governments and Native American stakeholders regarding issues important to Native Americans, including with tribal consortia, small businesses, education and training institutions including tribal colleges and universities, health-care providers, trade associations, research and grant institutions, law enforcement, State and local governments, and community and non-profit organizations;

(c) coordinate a more effective and efficient process for executive departments, agencies, and offices to honor the United States commitment to tribal consultation as set forth in Executive Order 13175 of November 6, 2000 (Consultation and Coordination With Indian Tribal Governments), and my memorandum of November 5, 2009 (Tribal Consultation); and

(d) assist the White House Office of Public Engagement and Intergovernmental Affairs in organizing the White House Tribal Nations Conference
EO 13648

Title 3—The President

each year by bringing together leaders invited from all federally recognized Indian tribes and senior officials from the Federal Government to provide for direct government-to-government discussion of the Federal Government’s Indian country policy priorities.

Sec. 5. General Provisions. (a) The heads of executive departments, agencies, and offices shall assist and provide information to the Council, consistent with applicable law, as may be necessary to carry out the functions of the Council.

(b) Nothing in this order shall be construed to impair or otherwise affect:
(i) the authority granted by law to an executive department, agency, or the head thereof; or
(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(d) For purposes of this order, “federally recognized tribe” means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

(e) For purposes of this order, “American Indian and Alaska Native” means a member of an Indian tribe, as membership is defined by the tribe.

(f) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

BARACK OBAMA

The White House,
June 26, 2013.

Executive Order 13648 of July 1, 2013

Combating Wildlife Trafficking

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to address the significant effects of wildlife trafficking on the national interests of the United States, I hereby order as follows:

Section 1. Policy. The poaching of protected species and the illegal trade in wildlife and their derivative parts and products (together known as “wildlife trafficking”) represent an international crisis that continues to escalate. Poaching operations have expanded beyond small-scale, opportunistic actions to coordinated slaughter commissioned by armed and organized criminal syndicates. The survival of protected wildlife species such as elephants, rhinos, great apes, tigers, sharks, tuna, and turtles has beneficial economic, social, and environmental impacts that are important to all nations. Wildlife trafficking reduces those benefits while generating billions
PRESIDENT NIXON, SPECIAL MESSAGE ON INDIAN AFFAIRS
JULY 8, 1970

The new direction of Indian policy which aimed at Indian self-determination was set forth by President Richard Nixon in a special message to Congress in July 1970. Nixon condemned forced termination and proposed recommendations for specific action. His introduction and conclusion are printed here.

To the Congress of the United States:

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 proved 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.

SELF-DETERMINATION WITHOUT TERMINATION

The first and most basic question that must be answered with respect to Indian policy concerns the history and legal relationship between the Federal government and Indian communities. In the past, this relationship has oscillated between two equally harsh and unacceptable extremes.

On the other hand, it has - at various times during previous Administrations - been the stated policy objective of both the Executive and Legislative branches of the Federal government eventually to terminate the trusteeship relationship between the Federal government and the Indian people. As recently as August of 1953, in House Concurrent Resolution 108, the Congress declared that termination was the long-range goal of its Indian policies. This would mean that Indian tribes would eventually lose any special standing they had under Federal law: the tax exempt status of their lands would be discontinued; Federal responsibility for their economic and social well-being would be repudiated; and the tribes themselves would be effectively dismantled. Tribal property would be divided among individual members who would then be assimilated into the society at large.

This policy of forced termination is wrong, in my judgment, for a number of reasons. First, the premises on which it rests are wrong. Termination implies that the Federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and that it can therefore discontinue this responsibility on a unilateral basis whenever it sees fit. But the unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States Government. Down through the years through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, the government has agreed to provide community services such as health, education and public safety, services which would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans.

This goals, of course, has never been achieved. But the special relationship between the Indian tribes and the Federal government which arises from these agreements continues to carry immense moral and legal force. To terminate this relationship would be no more
appropriate than to terminate the citizenship rights of any other American.

The second reason for rejecting forced termination is that the practical results have been clearly harmful in the few instances in which termination actually has been tried. The removal of Federal trusteeship responsibility has produced considerable disorientation among the affected Indians and has left them unable to relate to a myriad of Federal, State and local assistance efforts. Their economic and social condition has often been worse after termination than it was before.

The third argument I would make against forced termination concerns the effect it has had upon the overwhelming majority of tribes which still enjoy a special relationship with the Federal government. The very threat that this relationship may someday be ended has created a great deal of apprehension among Indian groups and this apprehension, in turn, has had a blighting effect on tribal progress. Any step that might result in greater social, economic or political autonomy is regarded with suspicion by many Indians who fear that it will only bring them closer to the day when the Federal government will disavow its responsibility and cut them adrift.

In short, the fear of one extreme policy, forced termination, has often worked to produce the opposite extreme: excessive dependence on the Federal government. In many cases this dependence is so great that the Indian community is almost entirely run by outsiders who are responsible and responsive to Federal officials in Washington, D.C., rather than to the communities they are supposed to be serving. This is the second of the two harsh approaches which have long plagued our Indian policies. Of the Department of Interior’s programs directly serving Indians, for example, only 1.5 percent are presently under Indian control. Only 2.4 percent of HEW’s Indian health programs are run by Indians. The result is a burgeoning Federal bureaucracy, programs which are far less effective than they ought to be, and an erosion of Indian initiative and morale.

I believe that both of these policy extremes are wrong. Federal termination errs in one direction, Federal paternalism errs in the other. Only by clearly rejecting both of these extremes can we achieve a policy which truly serves the best interests of the Indian people. Self-determination among the Indian people can and must be encouraged without the threat of eventual termination. In my view, in fact, that is the only way that self-determination can effectively be fostered.

This, then, must be the goal of any new national policy toward the Indian people to strengthen the Indian’s sense of autonomy without threatening this sense of community. We must assure the Indian that he can assume control of his own life without being separated involuntary from the tribal group. And we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support. My specific recommendations to the Congress are designed to carry out this policy....

The recommendations of this administration represent an historic step forward in Indian policy. We are proposing to break sharply with past approaches to Indian problems. In place of a long series of piecemeal reforms, we suggest a new and coherent strategy. In place of policies which simply call for more spending, we suggest policies which call for wise spending. In place of policies which oscillate between the deadly extremes of forced termination and constant paternalism, we suggest a policy in which the Federal government and the Indian community play complementary roles.

But most importantly, we have turned from the question of whether the Federal government has a responsibility to Indians to the question of how that responsibility can best be furthered. We have concluded that the Indians will get better programs and that public monies will be more effectively expended if the people who are most affected by these programs are responsible for operating them.

The Indians of America need Federal assistance – this much has long been clear. What has not always been clear, however, is that the Federal government needs Indian energies and Indian leadership if its assistance is to be effective in improving the conditions of Indian life. It is a new and balanced relationship between the United States government and the first Americans that is at the heart of our approach to Indian problems. And that is why we now approach these problems with new confidence that they will successfully be overcome.

Memorandum of November 5, 2009

Tribal Consultation

Memorandum for the Heads of Executive Departments And Agencies

The United States has a unique legal and political relationship with Indian tribal governments, established through and confirmed by the Constitution of the United States, treaties, statutes, executive orders, and judicial decisions. In recognition of that special relationship, pursuant to Executive Order 13175 of November 6, 2000, executive departments and agencies (agencies) are charged with engaging in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes.

History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.

My Administration is committed to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications including, as an initial step, through complete and consistent implementation of Executive Order 13175. Accordingly, I hereby direct each agency head to submit to the Director of the Office of Management and Budget (OMB), within 90 days after the date of this memorandum, a detailed plan of actions the agency will take to implement the policies and directives of Executive Order 13175. This plan shall be developed after consultation by the agency with Indian tribes and tribal officials as defined in Executive Order 13175. I also direct each agency head to submit to the Director of the OMB, within 270 days after the date of this memorandum, and annually thereafter, a progress report on the status of each action included in its plan together with any proposed updates to its plan.

Each agency’s plan and subsequent reports shall designate an appropriate official to coordinate implementation of the plan and preparation of progress reports required by this memorandum. The Assistant to the President for Domestic Policy and the Director of the OMB shall review agency plans and subsequent reports for consistency with the policies and directives of Executive Order 13175.

In addition, the Director of the OMB, in coordination with the Assistant to the President for Domestic Policy, shall submit to me, within 1 year from the date of this memorandum, a report on the implementation of Executive Order 13175 across the executive branch based on the review of agency plans and progress reports. Recommendations for improving the plans and making the tribal consultation process more effective, if any, should be included in this report.

The terms “Indian tribe,” “tribal officials,” and “policies that have tribal implications” as used in this memorandum are as defined in Executive Order 13175.

The Director of the OMB is hereby authorized and directed to publish this memorandum in the Federal Register.
This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. Executive departments and agencies shall carry out the provisions of this memorandum to the extent permitted by law and consistent with their statutory and regulatory authorities and their enforcement mechanisms.

THE WHITE HOUSE,
ORDER NO. 3335

Subject: Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries

Sec. 1 Purpose. In 2009, Secretary’s Order No. 3292 established a Secretarial Commission on Indian Trust Administration and Reform (Commission). The Commission issued its Final Report and Recommendations in December 2013, which sets forth its views and recommendations regarding the United States’ trust responsibility. In response to the report, this Order sets forth guiding principles that bureaus and offices will follow to ensure that the Department of the Interior (Department) fulfills its trust responsibility.

Sec. 2 Authority. This Order is issued pursuant to the U.S. Constitution, treaties, statutes, Executive Orders, and other Federal laws that form the foundation of the Federal-tribal trust relationship and in recognition of the United States’ trust responsibility to all federally recognized Indian tribes and individual Indian beneficiaries.

Sec. 3 Background. The trust responsibility is a well-established legal principle that has its origins with the formation of the United States Government. In the modern era, Presidents, Congress, and past Secretaries of the Interior have recognized the trust responsibility repeatedly, and have strongly emphasized the importance of honoring the United States’ trust responsibility to federally recognized tribes and individual Indian beneficiaries.

a. Legal Foundation. The United States’ trust responsibility is a well-established legal obligation that originates from the unique, historical relationship between the United States and Indian tribes. The Constitution recognized Indian tribes as entities distinct from states and foreign nations. Dating back as early as 1831, the United States formally recognized the existence of the Federal trust relationship toward Indian tribes. As Chief Justice John Marshall observed, “[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence ... marked by peculiar and cardinal distinctions which exist nowhere else.” Cherokee Nation v. Georgia, 30 U.S. 1, 16 (1831). The trust responsibility consists of the highest moral obligations that the United States must meet to ensure the protection of tribal and individual Indian lands, assets, resources, and treaty and similarly recognized rights. See generally Cohen’s Handbook of Federal Indian Law § 5.04[3] (Nell Jessup Newton ed., 2012); Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942).

The U.S. Supreme Court has repeatedly opined on the meaning of the United States’ trust responsibility. Most recently, in 2011, in United States v. Jicarilla, the Supreme Court recognized the existence of the trust relationship and noted that the “Government, following ‘a humane and self-imposed policy . . . has charged itself with moral obligations of the highest responsibility and trust,’ obligations ‘to the fulfillment of which the national honor has been
committed." The Court further explained that "Congress has expressed this policy in a series of statutes that have defined and redefined the trust relationship between the United States and the Indian tribes. In some cases, Congress established only a limited trust relationship to serve a narrow purpose. In other cases, we have found that particular statutes and regulations . . . clearly establish fiduciary obligations of the Government in some areas. Once federal law imposes such duties, the common law 'could play a role.' But the applicable statutes and regulations 'establish [the] fiduciary relationship and define the contours of the United States' fiduciary responsibilities.' United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2324-25 (2011)(internal citations omitted).

While the Court has ruled that the United States' liability for breach of trust may be limited by Congress, it has also concluded that certain obligations are so fundamental to the role of a trustee that the United States must be held accountable for failing to conduct itself in a manner that meets the standard of a common law trustee. "This is so because elementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch. 'One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets.' United States v. White Mountain Apache Tribe, 537 U.S. 465, 475 (2003)(internal citations omitted).

b. Presidential Commitments to the Trust Responsibility. Since this country's founding, numerous Presidents have expressed their commitment to upholding the trust responsibility. In the historic Special Message on Indian Affairs that marked the dawn of the self-determination age, President Nixon stated "[t]he special relationship between Indians and the Federal government is the result of solemn obligations which have been entered into by the United States Government . . . [T]he special relationship . . . continues to carry immense moral and legal force. To terminate this relationship would be no more appropriate than to terminate the citizenship rights of any other American." Public Papers of the President: Richard M. Nixon, Special Message on Indian Affairs (July 8, 1970).

For more than four decades, nearly every administration has recognized the trust responsibility and the unique government-to-government relationship between the United States and Indian tribes. President Obama established a White House Council on Native American Affairs with the Secretary of the Interior serving as the Chair. President Barack Obama, Executive Order No. 13647, Establishing the White House Council on Native American Affairs (June 26, 2013). The Order requires cabinet-level participation and interagency coordination for the purpose of "establish[ing] a national policy to ensure that the Federal Government engages in a true and lasting government-to-government relationship with federally recognized tribes in a more coordinated and effective manner, including by better carrying out its trust responsibilities." See also President Barack Obama, Memorandum on Tribal Consultation (Nov. 5, 2009); President George W. Bush, Executive Order No. 13336. American Indian and Alaska Native Education (Apr. 30, 2004); President William J. Clinton, Public Papers of the President: Remarks to Indian and Alaska Native Tribal Leaders (Apr. 29, 1994); President George H.W. Bush, Public Papers of the President: Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments (Jun.14, 1991); President Ronald Reagan, American Indian Policy Statement, 19 Weekly Comp. Pres. Doc. 98 (Jan. 24, 1983); President Gerald L. Ford, Public Papers of the President: Remarks at a Meeting
with American Indian Leaders (July 16, 1976); President Richard M. Nixon, Public Papers of the President: Special Message on Indian Affairs (July 8, 1970); President Lyndon B. Johnson, Public Papers of the President: Special Message to the Congress on the Problems of the American Indian: "The Forgotten American" (March 6, 1968).

c. **Congress.** Congress has also recognized the United States’ unique responsibilities to Indian tribes and individual Indian beneficiaries. Recently, Congress passed a joint resolution recognizing the “special legal and political relationship Indian tribes have with the United States and the solemn covenant with the land we share” and acknowledged the “long history of depredations and ill-conceived polices by the Federal government regarding Indian tribes” and offered “an apology to all Native peoples on behalf of the United States.” 111th Cong. 1st Sess., S.J. Res 14 (Apr. 30, 2009). Congress has expressly and repeatedly recognized the trust responsibility in its enactments impacting Indian Affairs. *See, e.g., Indian Education and Self-Determination and Assistance Act of 1975; Tribal Self-Governance Amendments of 2000; American Indian Trust Fund Management Reform Act of 1994; Federally Recognized Indian Tribe List Act of 1994; Tribally Controlled Schools Act of 1988 and Indian Education Act of 1972; Indian Child Welfare Act of 1978; Indian Mineral Development Act of 1982; Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 (HEARTH Act).*

d. **The Department of the Interior.** The Department likewise has recognized its obligations as a trustee towards Indian tribes and individual Indian beneficiaries and has been vested with the authority to perform certain specific trust duties and manage Indian affairs.

The Bureau of Indian Affairs (BIA) was transferred from the War Department to the Department in 1849. Congress delegated authority to the Department for the “management of all Indian affairs and of all matters arising out of Indian relations[,]” 25 U.S.C. § 2 (2014); *see also* 25 U.S.C. § 9 (2014); 43 U.S.C. § 1457. The BIA became the principal actor in the relationship between the Federal Government and Indian Tribes, and later Alaska Native Villages, exercising administrative jurisdiction over tribes, individual Indians, their land and resources.

The BIA has evolved dramatically over the last 185 years from an agency implementing past policies of allotment and assimilation, to a bureau charged with promoting and supporting Indian Self-Determination. In addition, several other bureaus and offices within the Department were created for or have specific duties with respect to fulfilling the trust responsibility, such as the Bureau of Indian Education, Office of the Assistant Secretary – Indian Affairs, Secretary’s Indian Water Rights Office, Office of the Special Trustee for American Indians, Land Buy-Back Program for Tribal Nations, Office of Historical Trust Accounting, Office of Natural Resource Revenue, Office of Appraisal Services, and Office of Minerals Evaluations. All of these programs support and assist federally recognized tribes in the development of tribal government programs, building strong tribal economies, and furthering the well-being of Indian people. As instruments of the United States that make policy affecting Indian tribes and individual Indian beneficiaries, the Bureau of Land Management, Bureau of Reclamation, Fish & Wildlife Service, National Park Service, and the Department’s other bureaus and offices share the same general Federal trust responsibility toward tribes and their members.
In an extended legal opinion regarding the meaning of the trust responsibility, former Department of the Interior Solicitor Leo M. Krulitz concluded that “[t]he trust responsibility doctrine imposes fiduciary standards on the conduct of the executive. The government has fiduciary duties of care and loyalty, to make trust property income productive, to enforce reasonable claims on behalf of Indians, and to take affirmative action to preserve trust property.” Memorandum from Department of the Interior Solicitor Leo M. Krulitz to Assistant Attorney General James W. Moorman, at 2 (Nov. 21, 1978). This opinion remains in effect today.

In exercising this broad authority, past Secretaries have acknowledged that the Department’s relationship with Indian tribes and individual Indian beneficiaries is guided by the trust responsibility and have expressed a paramount commitment to protect their unique rights and ensure their well-being, while respecting tribal sovereignty. See e.g., Secretary’s Order 3317, Department of the Interior Policy on Consultation with Indian Tribes (Dec. 01, 2011); Secretary’s Order 3175, Departmental Responsibilities for Indian Trust Resources (Nov. 8, 1993); Secretary’s Order 3206, American Indian Tribal Rights, Federal Trust Responsibilities, and the Endangered Species Act (Jun. 5, 1997); Secretary’s Order 3215, Principles for the Discharge of the Secretary’s Trust Responsibility (Apr. 28, 2000); Secretary’s Order 3225, Endangered Species Act and Subsistence Uses in Alaska (Jan. 19, 2001).

The Department has also sought to build a strong government-to-government relationship with Indian tribes. The Department of the Interior Policy on Consultation with Indian Tribes, which was adopted in December 2011, sets forth standards for engaging with Indian tribes on a government-to-government basis to ensure that the decisions of the Department consider the impacts on affected Indian tribes and their members.

Sec. 4  A New Era of Trust. During the last few decades, the trust relationship has evolved. In the Era of Tribal Self-Determination, the Federal trust responsibility to tribes is often fulfilled when the Department contracts with tribal governments to provide the Federal services owed under the trust responsibility. Because tribal governments are more directly accountable to the people they represent, more aware of the problems facing Indian communities, and more agile in responding to changes in circumstances, tribal governments can often best meet the needs of Indian people. In sum, the Federal trust responsibility can often be achieved best by empowering tribes, through legislative authorization and adequate funding to provide services that fulfill the goals of the trust responsibility.

In recent decades, the trust relationship has weathered a difficult period in which Indian tribes and individual Indians have resorted to litigation asserting that the Department had failed to fulfill its trust responsibility, mainly with regard to the management and accounting of tribal trust funds and trust assets. In an historic effort to rebuild the trust relationship with Indian tribes, the Department recently settled numerous “breach of trust” lawsuits. This includes Cobell v. Salazar, one of the largest class action suits filed against the United States, and more than 80 cases involving Indian tribes. Resolution of these cases marks a new chapter in the Department’s history and reflects a renewed commitment to moving forward in strengthening the government-to-government relationship with Indian tribes and improving the trust relationship with tribes and individual Indian beneficiaries.
As part of the *Cobell Settlement*, the Department established a Secretarial Commission on Indian Trust Administration and Reform in 2009 through Secretary’s Order No. 3292. The Commission issued its final report in December 2013. The report highlighted the significance of the Federal trust responsibility and made recommendations to the Department on how to further strengthen the commitment to fulfill the Department’s trust obligations. The Commission urged a “renewed emphasis on the United States’ fiduciary obligation” and asserted that this “could correct some [issues], especially with respect to ensuring that all federal agencies understand their obligations to abide by and enforce trust duties.”

As a response to the Commission’s recommendation, this Order hereby sets forth seven guiding principles for honoring the trust responsibility for the benefit of current and future generations.

**Sec. 5 Guiding Principles.** Pursuant to the long-standing trust relationship between the United States, Indian tribes and individual Indian beneficiaries and in furtherance of the United States’ obligation to fulfill the trust responsibility, subject to Section 6 below, all bureaus and offices of the Department are directed to abide by the following guiding principles consistent with all applicable laws. Bureaus and offices shall:

**Principle 1:** Respect tribal sovereignty and self-determination, which includes the right of Indian tribes to make important decisions about their own best interests.

**Principle 2:** Ensure to the maximum extent possible that trust and restricted fee lands, trust resources, and treaty and similarly recognized rights are protected.

**Principle 3:** Be responsive and informative in all communications and interactions with Indian tribes and individual Indian beneficiaries.

**Principle 4:** Work in partnership with Indian tribes on mutually beneficial projects.

**Principle 5:** Work with Indian tribes and individual Indian beneficiaries to avoid or resolve conflicts to the maximum extent possible in a manner that accommodates and protects trust and restricted fee lands, trust resources, and treaty and similarly recognized rights.

**Principle 6:** Work collaboratively and in a timely fashion with Indian tribes and individual Indian beneficiaries when evaluating requests to take affirmative action to protect trust and restricted fee lands, trust resources, and treaty and similarly recognized rights.

**Principle 7:** When circumstances warrant, seek advice from the Office of the Solicitor to ensure that decisions impacting Indian tribes and/or individual Indian beneficiaries are consistent with the trust responsibility.
Sec. 6 Scope and Limitations.

a. This Order is for guidance purposes only and is adopted pursuant to all applicable laws and regulations.

b. This Order does not preempt or modify the Department’s statutory mission and authorities, position in litigation, applicable privilege, or any professional responsibility obligations of Department employees.

c. Nothing in this Order shall require additional procedural requirements related to Departmental actions, activities, or policy initiatives.

d. Implementation of this Order shall be subject to the availability of resources and the requirements of the Anti-Deficiency Act.

e. Should any Indian tribe(s) and the Department agree that greater efficiency in the implementation of this Order can be achieved, nothing in this Order shall prevent them from implementing strategies to do so.

f. This Order is intended to enhance the Department’s management of the United States’ trust responsibility. It is not intended to, and does not, create any right to administrative or judicial review or any legal right or benefit, substantive or procedural, enforceable by a party against the United States, its agencies, or instrumentalities, its officers or employees, or any other person.

Sec. 7 Expiration Date. This Order is effective immediately and will remain in effect until it is incorporated into the Department Manual, or is amended, suspended, or revoked, whichever occurs first.

Date: August 20, 2014

[Signature]
Secretary of the Interior