NCHRP

National Cooperative Highway Research Program

LEGAL RESEARCH DIGEST

Legal Research Digests are issued to provide early awareness and encourage application of research results emanating from NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs." These Digests contain supplements and new papers that are periodically compiled as addenda to the treatise, *Selected Studies in Highway Law*, published by the Transportation Research Board.

Areas of Interest: IC Transportation Law, IIA Highway and Facility Design, IIC Maintenance, IVA Highway Operations, Capacity, and Traffic Control

Legal Issues Relating to the Acquisition of Right of Way and the Construction and Operation of Highways over Indian Lands

A report prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency conducting the research. The report was prepared by Richard O. Jones, James B. McDaniel, TRB Counsel for Legal Research, was the principal investigator and content editor.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report is a new paper, which continues NCHRP's policy of keeping departments up-to-date on laws that will affect their operations.

This paper will be published in a future addendum to *Selected Studies in Highway Law* (SSHL). Volumes 1 and 2 deal primarily with the law of eminent domain and the planning and regulation of land use. Volume 3 covers government contracts. Volume 4 covers environmental and tort law, inter-governmental relations, and motor carrier law. An expandable format permits the incorporation of both new topics as well as supplements to published topics. Updates to the bound volumes are issued by addenda. The 5th Addendum was published in November 1991. Addenda are published on an average of every three years. Between addenda, legal research digests are issued to report completed research. Presently the text of SSHL totals over 4,000 pages comprising 75 papers.

Copies of SSHL have been sent, without charge, NCHRP sponsors, certain other agencies, and cted university and state law libraries. The officials iving complimentary copies in each state are the rney General and the Chief Counsel and Right-of- Director of the highway agency. Beyond this initial ibution, the 4-volume set is for sale through the sportation Research Board ($185.00).

APPLICATIONS

State highway departments have increasingly encountered problems in planning, developing, constructing, and operating highways that cross Indian reservations because of jurisdictional conflicts with Indian tribes and the Indian self-determination policy supported by the Federal government.

At a White House ceremony April 29, 1994, President Clinton announced strong support of tribal sovereignty and issued a Presidential memorandum to all agency heads, directing that each operate within a government-to-government relationship with federally recognized tribes. The memorandum further requires federal agency officials to consult with tribal councils before developing federal regulations affecting Indian reservations.

According to a compilation by officials within the U.S. Bureau of Indian Affairs, there are now about 349 tribes on reservations or Indian lands located in 34 states. The prevalence of Indian reservations and the growing assertiveness of tribal councils suggest that jurisdictional issues will intensify.

This report should give highway officials a basic understanding of laws relating to Indian reservations and what to expect when confronted by a jurisdictional conflict involving Indian land. It should provide guidance to state highway department directors, attorneys, planners, right-of-way officials, and public information officers.

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Legal Issues Relating to the Acquisition of Right of Way and the Construction and Operation of Highways over Indian Lands

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I. INTRODUCTION

During the past 3 decades state highway agencies have increasingly experienced problems in the planning, project development, construction, and operation of state highways crossing Indian reservations. This has been particularly evident in western states, which contain large areas of Indian lands, many of which are transversed by state highways. Many of the problems encountered stem from jurisdictional conflicts with Indian tribes and their self-determination policies. A renewed assertion of tribal sovereignty, fully supported by a revised federal Indian policy, and the past reluctance of state officials to accept tribal sovereignty are at the root of the conflicts. Much of the conflict and the resulting problems are caused by a misunderstanding of federal Indian law, federal requirements and limitations in the Federal-Aid Highway Program, and by a lack of open communication and government-to-government cooperation.

The renewed assertion of Indian tribal sovereignty, commonly referred to as the "self-determination era," began in 1961 and continues to the present time.[1] This policy and the legislation and programs to support it evolved in response to Indian demands for self-determination, which had the official support of six presidents.[2] At a White House ceremony on April 29, 1994, attended by more than 200 American Indian leaders, a seventh president, Bill Clinton, continued that support by issuing a Presidential Memorandum to all heads of executive departments and agencies. The memorandum recognized the sovereignty of tribal governments, directed that each department and agency operate within a government-to-government relationship with federally recognized tribal governments, and required all federal agencies to consult with tribal councils before developing federal regulations affecting Indian reservations.[3]

According to Cohen:

> The self-determination era is premised on the notion that Indian tribes are the basic governmental units of Indian policy. During the period of Indian reorganization in the 1930's tribal governments were brought back to life; during the 1970's, tribal governments have been affirmatively strengthened. Self-determination has operated on a number of fronts to promote the practical exercise of inherent sovereign powers possessed by Indian tribes.[4]

II. INDIANS, INDIAN TRIBES, INDIAN RESERVATIONS, AND INDIAN COUNTRY

A. Background

According to the U.S. Census Bureau, there were 1,959,234 American Indians and Alaska natives living in the United States in 1990 (1,878,285 American Indians, 57,152 Eskimos, and 23,797 Aleuts). This is a 37.9 percent increase over the 1980 recorded total of 1,420,400. The increase is attributed to improved census taking and more self-identification during the 1990 count. The Bureau of Indian Affairs (BIA) estimates that in 1990 almost 950,000 Indians lived on or adjacent to federal Indian reservations. Members of federally recognized tribes who do not reside on or near their reservations have limited relations with BIA because the bureau's programs are primarily administered for members of federally recognized tribes who live on or near reservations.[5]

A total of 278 land areas in the United States are administered as federal Indian reservations (reservations, pueblos, rancherias, communities, etc.). These land areas are located in 33 states. The largest is the Navajo Reservation, which occupies 16 million acres in Arizona, New Mexico, and Utah.[6] Many of the smaller reservations are less than 1,000 acres, with the smallest less than 100 acres. A total of 56.2 million acres are held in trust by the United States for various Indian tribes and individuals. Although much of this is reservation land, not all reservation land is trust land.[7]

B. Who Are Indians?[8]

The term "Indian," as applied to the inhabitants of the Americas at the time of Columbus's discovery, is a misnomer, resulting from the fact that Columbus thought he had reached India. However, the name remains for those inhabitants and their descendants, and it was institutionalized by being placed in the U.S. Constitution.[9] According to Cohen:

> The term "Indian" may be used in an ethnological or in a legal sense. If a person is three-fourths Caucasian and one-forth Indian, that person would ordinarily not be considered an Indian for ethnological purposes. Yet legally such a person may be an Indian. Racial composition is not always dispositive in determining who are Indians for purposes of Indian law. In dealing with Indians, the federal government is dealing with members or descendants of political entities, that is, Indian tribes, not with persons of a particular race.[10] (citations omitted)

There is no single federal or tribal criterion that establishes a person's identity as an Indian. Government agencies use differing criteria to determine who is an Indian eligible to participate in their programs, and tribal membership criteria vary.[11] For example, the Indian Reorganization Act of 1934, 25 U.S.C. Sections 461–79 (1982), used the following definition:

> 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 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 people of Alaska shall be considered Indians.[12]

There has never been a general definition of the term "Indian" that could be used by the courts.[13] It is clear that the diversity of the use of, and the varying definitions for, the term "Indian" require practitioners to specifically determine at the outset the purpose for which identification is relevant. However, the following working definition has been suggested:

> [A] person, some of whose ancestors lived in America before the arrival of Whites, who is generally considered to be an Indian by the community in which he lives or from which he comes, and who holds himself out to be an Indian.[14]

C. What Is an Indian Tribe?[15]

Originally, an Indian tribe was a body of people bound together by blood ties and socially, politically, and religiously organized. They lived together in a defined territory, and they spoke a common language or dialect.[16] Even though the Constitution, Article I, Section 8, clause 3, and many federal statutes and regulations use the term, there is today no single federal statute that defines "Indian tribe" for all purposes.[17]

Although a group of Indians may consider itself a "tribe," that group must meet the requirements for recognition established by the Secretary of the Interior to qualify for federal benefits afforded Indian tribes. Such recognition by the Secretary of the Interior is given substantial, and perhaps complete, deference by courts.[18] As late as 1977, less than 300 of the 400 tribes that then claimed to exist had been officially recognized by the Secretary of the Interior.[19] By 1991 there were 510 federally recognized tribes in the United States, including about 200 village groups in Alaska.[20] In 1978, the Department of the Interior adopted regulations at 25 C.F.R. Part 83, establishing a procedure for tribal recognition. The extensive elements that must be stated in a petition for recognition are set out in 25 C.F.R. Section 83.7.

D. "Indian Country" and "Indian Reservations"[21]

Federal policy from the beginning has recognized and protected separate status for tribal Indians in their own territory.[22] After the Continental Congress declared its jurisdiction over Indian tribes on July 12, 1775,[23] the first Indian treaty guaranteed the Delaware Indians "all their territorial rights in the fullest and most ample manner...."[24] In describing the territory controlled by Indians, Congress first used the term "Indian country."[25]

The period between 1835 and 1861 is known as the Removal Period, marking a time when, because of increasing pressure from the states, the federal government began to force the eastern tribes to cede their land by treaty in exchange for reserved land in the West. Several treaties in the 1850s "reserved" land for tribal occupancy.[26]

The period 1861 to 1887 is known as the Reservation Period, when Congress recognized these reservations as permanent areas under tribal jurisdiction within the states. This was first done in the Enabling Act for the Kansas Territory.[27] Other such enabling acts or state constitutions recognized these reservations and disavowed state jurisdiction.[28] The overriding goal of the United States during the treaty-making period was to obtain aboriginal Indian lands, especially those being encircled by non-Indian settlements.[29] During this period (1789 to 1871), "aboriginal title" was virtually extinguished, usually by treaties reserving different lands for exclusive tribal occupancy, and subsequently other reservations were established by statute,[30] agreements, and executive orders.[31]

Although the term "Indian reservation" has been historically used and appears in scores of provisions of the United States Code, particularly Title 25 (Indians), there is no single federal statute that defines it for all purposes. For example, the definition of "Indian reservation roads" in 23 U.S.C. 101 includes public roads located within or providing access to "Indian reservations" and other Indian lands, but does not define the term. Curiously, one of the few federal statutes offering a definition includes Indian land that is clearly not an Indian reservation. The Indian Financing Act of 1974, 25 U.S.C. Section 1451 *et seq.*, uses the following definition:

> "Reservation" includes Indian reservations, public domain Indian allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act. 25 U.S.C. § 1452(d).

In Notice N-915.027, issued May 16, 1988, the Equal Employment Opportunity Commission (EEOC) adopted this definition for purposes of Title VII of the Civil Rights Act, so that the terms "Indian reservation" and "reservation" in Section 703(i) of Title VII, as amended, 42 U.S.C. Section 2000e-2(i), include former Indian reservations in Oklahoma and land held by incorporated native groups, regional corporations, and village corporations in Alaska.

The term "Indian country" is defined in federal law to describe Indian land areas where the federal government exercises criminal jurisdiction. This definition is found in 18 U.S.C. Section 1151 (1988):

> Except as otherwise provided in sections 1154 and 1156 of this Title, the term "Indian country"...means (a) 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 any rights-of-way running through the reservation*, (b) all dependent Indian communities within the borders of the United States whether within or without the limits of the state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. (emphasis added)

Thus, the term "Indian country" is broader than the term "Indian reservation," and the former encompasses the latter.

III. FEDERAL TRUST RESPONSIBILITY AND "INDIAN TITLE"[32]

A. Federal Government's Trust Responsibility

In the more than 600 treaties entered into with Indian tribes between 1787 and 1871, when Congress ended such treaty making,[33] many explicitly provided for territorial protection by the United States,[34] and numerous treaties declared their status as dependent nations. During this period of "extinguishment" of aboriginal title and establishment of reservations, the concept of a federal trust responsibility to Indians evolved judicially.[35] It first appeared in Cherokee Nation v. Georgia,[36] where Chief Justice Marshall concluded that Indian tribes "may, more correctly, perhaps, be denominated domestic dependent nations...in a state of pupilage and that [t]heir relation to the United States resembles that of a ward to his guardian."[37]

This trust relationship is now one of the significant features of Indian law, and it plays a major role in the procedures established for the acquisition of Indian lands, as will be discussed later.[38]

B. Indian Title

The aboriginal entitlement concept was addressed in the early case of Johnson v. McIntosh (1823),[39] where Chief Justice Marshall held that discovery gave the European powers the fee-simple ownership of the domain they discovered, subject

to a right of occupancy by the Indians, or "Indian Title." The discovering sovereign thus acquired "an exclusive right to extinguish the Indian title either by purchase or conquest." This fee title passed to the United States on independence.[40] The federal government possesses the unquestioned power to convey the fee lands occupied by Indian tribes, although the grantee takes only the naked fee and cannot disturb the occupancy of the Indians.[41] Subsequent decisions clearly established that the extinguishment of Indian title (occupancy) could only be accomplished by Congress through treaty, statute, or congressionally authorized executive actions,[42] or by voluntary abandonment of aboriginal land.[43]

Indians possess two types of title over their lands. The first, "aboriginal" or "Indian title," derives from actual, exclusive, and continuous occupancy for a long period of time.[44] Such title held against anyone but the United States,[45] and, as noted earlier, only the United States could extinguish that title.[46]

The second type of title to Indian lands is "recognized" or "treaty" title, which derives from an acknowledgment by the United States that the Indians have a legal right to permanently occupy and use the lands.[47] This type of title constitutes a legal interest in the land that can only be extinguished upon payment of compensation.[48] Abrogation of treaty-recognized title requires an explicit statement by Congress or congressional intent that is clear from the legislative history or surrounding circumstances of the particular act.[49] Such intent was found by the Supreme Court in *Clairmont v. United States*,[50] where the Court found that Congress intended to extinguish Indian title by the grant of a railroad right of way through the Flathead Reservation in Montana.[51]

C. Allotted Lands Held in Trust

Although tribal land is held in common for the benefit of all members of the tribe, from 1854 to 1934 the United States followed a policy of allotting tribal land to individual Indians.[52] This policy was intended to promote assimilation of Indians into American society.[53] Under this policy, the United States allotted millions of acres of tribal lands on certain Indian reservations to individual Indians.[54] The passage of the General Allotment Act of 1887, commonly referred to as the Dawes Act, constituted a formalization of this policy and provided for the mandatory allotment of reservation lands to individual Indians, with surplus lands made available to non-Indians by fee patent. Although Section 5 of the Dawes Act provided that title to allotments was to be held in trust by the United States for 25 years, longer if determined by the President, the majority of Indian lands passed from native ownership under the allotment policy.[55] Out of approximately 156 million acres of Indian lands in 1881, less than 105 million acres remained by 1890, and only 78 million acres remained by 1900.[56] By 1934 more than 60 percent of the 1887 tribal land base (138 million acres) had passed through individual Indian allotment status to non-Indian fee ownership.[57]

Although the allotment policy ended with passage of the Indian Reorganization Act in 1934,[58] it resulted in reservations becoming checkerboarded among tribal lands, allotted individual Indian lands held in federal trust, and patented lands, owned in fee by either Indians or non-Indians, but no longer in trust status. This situation exists today within the exterior boundaries of many reservations. Some reservations have a high percentage of land owned and occupied by non-Indians, but 140 reservations have land that is entirely tribally owned.[59] This significantly complicates the process of acquiring lands within a reservation primarily because federal requirements differ with each type of land holding.

IV. ACQUISITION OF INDIAN LAND FOR HIGHWAY RIGHTS OF WAY

A. General

As a general rule, Indian lands are not included in the term "public lands," which are lands subject to sale or disposal under general statutory law.[60] All questions with respect to rights of occupancy in land and the manner, time, and conditions of extinguishment of Indian title are solely for consideration of the federal government.[61] As a corollary to this, third parties, such as states and political subdivisions, acquire only such rights and interests in Indian lands as may be specifically granted to them by the federal government. To ensure the utmost fairness in transactions between the United States and Indian tribes, any intent to deprive a tribe of its rights in land or otherwise bring about the extinguishment of Indian title, either by grants in abrogation of existing treaties or through other congressional legislation, must be clearly and unequivocally stated. In addition, language appearing in such grants and statutes is not to be construed to the prejudice of the Indians.[62]

B. Grants of Indian Land for Highway Purposes

1. Use of BIA Authority and Procedures

a. Statutory Provisions.—Pursuant to the act of March 3, 1901, 25 U.S.C. Section 311, the Secretary of the Interior may grant permission to the proper state or local authority to establish public highways through any Indian reservation or through restricted Indian lands that had been allotted to individual Indians under any law or treaty.[63] The act of March 3, 1901, was one of an amalgam of special-purpose access statutes dating back as far as 1875, each limiting the nature of rights of way to be obtained and creating an unnecessarily complicated procedure.[64] The very limited regulations implementing 25 U.S.C. Section 311 appear at 25 C.F.R. Section 169.28 and make Part 169 applicable to such requests for rights of way.[65]

In 1948, Congress enacted a general statute titled the Indian Right of Way Act, authorizing the Secretary of the Interior to grant rights of way for any purposes over all trust and restricted lands.[66] The purpose of this act was to simplify and facilitate the process of granting rights of way across Indian lands.[67] The statute provides that "any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands" is not repealed. Thus, 25 U.S.C. Section 311, remains unchanged.[68] This 1948 statute provides that "no grant of a right-of-way over and across any lands belonging to a tribe" organized under the Indian Reorganization Act "shall be made without the consent of the proper tribal officials."[69] Consent of all tribes is required by departmental regulations for rights of way over tribal lands.[70] Consent of individual Indians is also generally required.[71]

b. Judicial Construction of Right-of-Way Grants.—The Supreme Court of Wisconsin, in *State v. Tucker*, considered the question of whether a grant to the state, under Section 311, of the right to construct, operate, and maintain State Highway No. 47 through the Menominee Reservation in Wisconsin was effective to destroy the Indian title so as to give the state such complete power to regulate the use and occupancy of that highway as against all the public, including the tribal Indians.[72] The case involved the conviction of Tucker, an enrolled member of the Menominee Tribe, for the misdemeanors of failure to register his truck and to pay a registration fee for its operation over that portion of Highway No. 47 within the

exterior boundaries of the reservation. The facts showed that Tucker operated his truck and trailer to haul logs from one part of the reservation to another, using Highway 47 only within the reservation.

The court in *Tucker* first noted that the Indian title was only the right of occupancy extinguishable at will by the United States, citing *Johnson v. M'Intosh.*[73] It reasoned that a grant by the United States of a right of way and permission to maintain a public highway must destroy the possessory right of the Indians and therefore destroy Indian title. The opinion concluded with the following:

> [T]hat a grant by the United States to the state of Wisconsin of a right of way to construct and maintain a public highway must, in the absence of express declaration to the contrary, be assumed to vest the state with such control of the highway as is usual and necessary to the construction and maintenance of such a highway; that such a grant extinguishes the right of occupancy in the Menominee Indians commonly referred to as Indian title, at least to the extent necessary to vest such jurisdiction and control; that while so maintained, the highway ceases to be Indian land; and that the rights of Indians to use the highway are the same as those of the general public and subject to the same regulations and restrictions. It follows that the trial court had jurisdiction of the offense, and defendant was properly convicted (at 647–48).

The following year, in *Application of Konaha*, the Court of Appeals for the Seventh Circuit considered the appeal of a conviction for the felony crime of negligent homicide by an enrolled member of the Menominee Indian Tribe. Konaha killed another enrolled member while driving his automobile under the influence of alcohol on Wisconsin Highway No. 47, within the reservation.[74] The sheriff's return to the *habeas corpus* application that follows relied on the fact that the crime was committed on a highway constructed and maintained by the State of Wisconsin, citing the decision in *State v. Tucker.*

The court of appeals noted at the outset that it was well settled that in the absence of legislation by Congress conferring jurisdiction on Wisconsin state courts, the courts have no jurisdiction over crimes committed by tribal Indians on Indian reservations, citing *State v. Rufus*, 205 Wis. 317, 237 N.W. 67, and *U.S. v. Kagama*, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed.228.[75] The court of appeals went on to frame the issue before it as a narrow "consideration of the effect of the grant of authority to Wisconsin to build and maintain a highway through the reservation." The court distinguished this case from *Tucker* because the former involved a misdemeanor, while this one involved a felony crime. The court found "it impossible to conclude that the above-mentioned grant [grant of right of way under § 311] carried, by implication, a grant of jurisdiction to the State over crimes committed by the Indian."[76] In *dicta*, the following observations were made:

> It is true that the grant of a right to maintain a highway must carry with it certain implications respecting the protection of said highway against depredations. If, however, there were any implications arising therefrom which would subject the Indian members to Wisconsin penal statutes, they would be limited to such penal provisions as served to protect and preserve the highway, such as speeding, impairing the highway, etc.
>
> Whether there was an implied grant of jurisdiction to Wisconsin so as to permit adequate protection of its highway by state statutes, we need not determine. No such case is before us. The case before us is that of manslaughter—killing by the negligence of a drunken driver. The fact that it occurred on the highway does not make its punishment essential or vital to building or maintenance of the highway.[77]

The U.S. District Court decision in *In re Fredenberg*[78] considered the identical facts as occurred in *Tucker* (i.e., failing to register his logging truck and operating it on Wisconsin Highway No. 47, within the Menomiee Reservation), but squarely rejected the *Tucker* decision:

> This court stated in the case of Application of Konaha, D.C., 43 F.Supp. 747, that the decision in State v. Tucker, *supra*, was unsound and that this court was not bound by that decision...,the Circuit Court of Appeals in Application of Konaha, 7 Cir., 131 F.2d 737, left undecided the question on facts such as presented in the case now before us.... For the reasons I stated in Application of Konaha...I think the Wisconsin court is in error.
>
> The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history. Rice v. Olson, 324 U.S. 786, 789, 65 S.Ct. 989, 991. There is no legitimate implication to be drawn that Congress intended any grant of jurisdiction when it permitted the State primarily for its own convenience to establish a State highway across the reservation. The act of June 28, 1932, c. 284, 47 Stat. 336, 18 U.S.C.A. 548, provided for the trial of designated crimes in the federal courts when committed upon any Indian reservation and specifically designated rights of way running through the reservation as coming within the scope of that act. In the Tucker case the Wisconsin Supreme Court did not notice that by the act of 1932 Congress had asserted exclusive jurisdiction in the federal courts as to crimes committed by Indians on the rights of way within Indian reservations (emphasis added).[79]

The Supreme Court of Arizona, in *Application of Denet-Claw*,[80] rejected the opinion in *Tucker* and relied on the opinion in *In re Fredenberg* in dismissing traffic citations to a Navajo Indian for violations occurring on U.S. 66 within the Navajo Reservation:

> We hold, therefore, the State's contention that the granting of an easement for a right of way [under 25 U.S.C. § 311] by implication conferred jurisdiction on Arizona courts over Indian traffic offenders is untenable as it completely ignores the express definition of what constitutes "Indian country" found in section 1151, *supra*. [18 U.S.C. § 1151].[81]

The Supreme Court of New Mexico, in *State of New Mexico v. Begay*,[82] also rejected *Tucker* and relied on *In re Fredenberg* in holding:

> [T]hat the authority under which the State was permitted to construct Highway 66 through, and over, the Navajo reservation [25 U.S.C. § 311] failed to extinguish the title of the Navajo Indian Tribe.... Since the State has no jurisdiction over Indian reservations until title in the Indians is extinguished, and the easement to the State did not affect the beneficial title, there is no basis upon which the State can claim jurisdiction.[83]

Finally, in *State v. Webster*,[84] a 1983 decision of the Wisconsin Supreme Court, the court overruled *State v. Tucker*, holding that the state did not have jurisdiction to charge and prosecute traffic offenses by Menominee Indians on a state highway within the reservation because (*a*) title to the land underlying the state highway remained part of the reservation, (*b*) the tribe had a well-established tradition of tribal self-government in the area of traffic regulation, and (*c*) state jurisdiction would interfere with tribal self-government and impair a right granted or reserved by federal law. The court said:

> We conclude that the language of 25 U.S.C. sec. 311, taken together with the expressed congressional intent to include rights-of-way as part of Indian country, implies that the granting of the Highway 47 right-of-way pursuant to sec. 311 neither extinguished title in the Menominee Tribe nor constituted a general grant of jurisdiction to the state over the land constituting the right-of-way. Anything in State v. Tucker, supra, contrary to our holding in this case is hereby overruled.[85]

c. Utilities within the Right of Way.—The Supreme Court, in *United States v. Oklahoma Gas & Electric Co.,* considered the question of whether a grant of right of way over allotted lands held in trust under 23 U.S.C. Section 311 included the right to permit maintenance of rural electric service lines within the highway bounds.[86] The action was brought by the Secretary of the Interior, who considered this use, under license by the Oklahoma State Highway Commission, as not warranted by the grant. The Court noted that such use was a lawful and proper highway use under Oklahoma law. It held that the utility use in accordance with state law was covered under the Section 311 grant of right of way. A U.S. District Court followed this precedent in *United States v. Mountain States Telephone and Telegraph Co.,* which involved buried cable on state highway across tribal land, ruling that "Mountain Bell does have a right to maintain its buried telephone cable in the highway right-of-way and is not trespassing."[87]

2. Use of FHWA Title 23, U.S.C., Procedures

The question sometimes arises as to whether the right-of-way acquisition or appropriation procedures of 23 U.S.C. Sections 107 and 317 may be used to obtain rights of way over Indian lands. Section 107 authorizes the Secretary of Transportation, at the request of a state, to acquire by federal condemnation lands or interests in lands required for rights of way for the National System of Interstate and Defense Highways, when the state is unable to do so. Section 317 details the procedure to be followed in appropriating lands or interests in lands owned by the United States for the right of way of any highway upon application of the Secretary of Transportation to the federal agency having jurisdiction over the land.[88]

This provision of law was addressed by the court of appeals for the Ninth Circuit in *United States v. 10.69 Acres of Land,*[89] which involved allotted Indian tribal lands held in trust by the United States for the benefit of the Confederated Tribes and Bands of the Yakima Indian Nation. The Washington State Department of Transportation needed the lands for an interstate highway right of way. The U.S. Department of Transportation was requested to acquire the land invoking Section 107, and the Department of Justice commenced condemnation action in the U.S. District Court. The court dismissed the action, and the Ninth Circuit affirmed on the ground that such tribal lands may be appropriated for highway purposes "only by utilizing the administrative procedures provided for in 23 U.S.C. 107(d) and 317," which the court said "are to be read together."[90] The court of appeals reviewed the Title 23, U.S.C., procedures of Sections 107 and 317 together with the Title 25, U.S.C., procedures of Sections 311, 323–28, and 357, and found them to be complementary. Circuit Judge Browning concluded:

> The structure of these provisions of Titles 23 and 25, and the evident purpose they serve, offer strong support for interpreting sections 107(a) and (d) and 317 of Title 23 to mean that Indian tribal lands may be secured for highway use only by administrative appropriation under sections 107(d) and 317, and not by condemnation under section 107(a). The officials most immediately concerned with the administration of the federal highway program are apparently of the same view (referring to Bureau of Public Roads Policy and Procedure Memorandum 80-8 of April 17, 1967).[91]

Based on this Ninth Circuit decision, it seems clear that a state transportation agency may apply directly to BIA for rights of way across Indian lands, following the procedures of 25 C.F.R. Section 169, or it may make application through the Federal Highway Administration (FHWA) pursuant to 23 C.F.R. Section 712, Subpart E,[92] in which case FHWA would follow the same BIA procedures. In either case, as pointed out by the court, the consent of the Secretary of Interior would be necessary, and the approval, if given, would be subject to such requirements as deemed necessary.

The power of the United States to control the affairs of Indians is subject to constitutional limitations and does not enable the United States, without paying just compensation, to appropriate lands of an Indian tribe.[93] Therefore, unlike the vast majority of federal land transfers occurring under 23 U.S.C. Sections 107 and 317, which are at no cost to a state transportation agency, just compensation of not less than the fair market value of the rights granted, plus severance damages, if any, must be paid to the tribe or individual Indian owners for rights of way granted, except when waived in writing.[94]

C. Use of Eminent Domain to Acquire Indian Land

The act of March 3, 1901, provided that "[l]ands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."[95] This provision of law was considered by the U.S. Supreme Court in *State of Minnesota v. United States,*[96] where the United States challenged a condemnation action brought by Minnesota in state court for a highway over nine parcels allotted in severalty to individual Indians by trust patents.

Minnesota contended that the statute (25 U.S.C. Section 357) authorized it to condemn allotted lands in state courts without making the United States a party. The Court first held that since the United States was the owner of the fee, the suit was one against the United States, and it was an indispensable party to the condemnation proceedings.[97] Second, the Court noted that the statute "contains no permission to sue in the court of a state" and that "judicial determination of controversies concerning [Indian] lands has been commonly committed exclusively to federal courts."[98]

Several U.S. circuit courts have rejected the contention that the Indian Right-of-Way Act of 1948 repealed, by implication, portions of the act of 1901 and that a condemnation action required the consent of the Secretary of Interior or of the Indians.[99] According to these cases, Section 357 stands alone in providing the authority to condemn allotted Indian land without consent of Indians or the Secretary of the Interior. However, as previously noted, tribal land is not subject to condemnation.[100]

The U.S. Supreme Court in *United States v. Clarke*[101] considered the question of whether 25 U.S.C. Section 357 authorizes the taking of allotted Indian land by physical occupation, commonly called "inverse condemnation." The Court, reversing the court of appeals for the Ninth Circuit, found that the word "condemned," as used in 1901 when 25 U.S.C. Section 357 was enacted, had reference to a judicial proceeding instituted for the purpose of acquiring title to private property and paying just compensation for it, not to physical occupation, or "inverse condemnation," even though that method was authorized by state law.[102] The Supreme Court decision strictly construes the statute and would appear to foreclose any taking of allotted Indian land except by formal condemnation proceedings. This would also seem to preclude, for example, "regulatory takings" that were not authorized in formal condemnation proceedings.

V. ISSUES RELATING TO HIGHWAY CONSTRUCTION ON INDIAN RESERVATIONS

A. Tribal Sovereign Authority[103]

Beginning with the rulings in *Cherokee Nation v. Georgia* and *Worcester v. Georgia*,[104] the U.S. Supreme Court has held that Indian tribes retain inherent sovereign authority over their reservation lands and activities except to the extent withdrawn by treaty, federal statute, or by implication as a necessary result of their status as "dependent domestic nations."[105] In Worcester, Chief Justice Marshall stated:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights.... 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.[106]

In these decisions the Court viewed the Indian nations as having distinct boundaries within which their jurisdictional authority was exclusive—a "territorial test." Pevar, in his book *The Rights of Indians and Tribes*, examines nine of the most important areas of tribal self-government:[107]

- formation of a government
- determination of tribal membership
- regulation of tribal property
- regulation of individual property
- the right to tax
- the right to maintain law and order
- the right to exclude nonmembers from tribal territory
- the right to regulate domestic relations
- the right to regulate commerce and trade

In later years, the Court went beyond the territorial test. It formulated other tests that generally decreased Indian tribal jurisdiction and increased state jurisdiction. This was based primarily on the tribe's "dependent status," moving from an "infringement test"[108] to a "preemption test."[109] In 1978 the Court rendered decisions in three cases that further defined the inherent sovereignty of Indian tribes by creating and expanding an "inherent limitations" doctrine, which seemed to limit a tribe's inherent regulatory authority to internal matters among tribal members.[110]

This limitation became less certain after the Court's decision in *Washington v. Confederated Tribes of Colville Indian Reservation*,[111] where the Court upheld the power of tribes to tax on-reservation cigarette sales to non-Indians, recognizing that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians entering the reservation to engage in economic activity:

> [T]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.[112]

But a few months later, in the seminal case of *Montana v. United States*,[113] the Court held that the Crow Tribe lacked inherent civil authority to regulate fishing by non-Indians on non-Indian-owned fee lands within the reservation where no important tribal interest was affected. But the decision made clear that although there is a presumption against tribal power to regulate activities of nonmembers, it can be done if there is a tribal interest sufficient to justify tribal regulation. The Court then gave two basic tests for where and how that could occur:

> 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. [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.* [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.*[114] (emphasis added) (citations omitted)

In 1989, the concept of inherent tribal sovereignty was eroded even further as a result of the opinions in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*.[115] The opinions reviewed the authority of the tribes to impose zoning regulations on two pieces of property owned in fee by nonmembers, which were already under zoning by Yakima County, Washington. Roughly 80 percent of the reservation land was held in trust by the United States, with 20 percent owned in fee by Indian or non-Indian owners. Most of this fee land was in three towns, the rest were scattered in a "checkerboard" fashion throughout the reservation. The reservation was divided informally into an "open area" and "closed area." The open area covered the eastern third of the reservation, half of which was owned in fee by nonmembers who composed 80 percent of the population. One of the fee-owned properties sought to be zoned was in this open area. The other fee-owned property sought to be zoned lies in the closed area, 97 percent of which was tribal land containing no permanent residents and described as an "undeveloped refuge of cultural and religious significance" to which access by nonmembers was restricted.

Three separate views of tribal inherent power resulted:

1. Justice White, writing for himself and three others, held that the tribe had neither treaty-reserved nor inherent powers to zone nonmember fee lands.

2. Justice Blackmum, writing for himself and two others, was of the opinion that the tribe had the full inherent sovereign power to zone both member and nonmember fee lands lying within the reservation

3. Justice Stevens, joined by one other justice, was of the opinion that the tribe could zone the nonmember fee property in the closed area, but not the open area.

The result of this split decision was that zoning was upheld only as to the closed area. The significance of the White opinion is that he and three other justices departed from the analysis in *Montana* and held tribal regulatory jurisdiction over nonmember fee lands was prohibited *per se*, even when conduct threatened the political integrity, the economic security, or the health and welfare of the tribe (second proviso of *Montana*).[116] But the first proviso of *Montana* survived so that a tribe may still 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." As concluded in the analysis of *Brendale* in the *American Indian Law Deskbook*:[117]

> Despite the fractured nature of the opinions in *Brendale*, a present majority of the Court has adopted the general premise that, outside a land-use situation, inherent tribal regulatory authority extends to nonmembers only when express or constructive

consent is present, such as through voluntary on-reservation business transactions with tribes or use of tribal lands. This conclusion was reinforced in *Duro v. Reina*[118] where the Court held a tribe lacked criminal jurisdiction over a nonmember Indian with respect to on-reservation conduct.... The Court's decisions since *Oliphant* thus reflect a strong tendency to restrict inherent tribal authority over nonmembers to a consensual core—the first *Montana* exception.

B. Planning and Project Development Activities

1. Planning

In view of the quasi-sovereign status of the Indian tribes, it is important to recognize during planning and project development that a government-to-government relationship is being entered into when a state or local government plans a highway project on Indian reservation lands. Congress underscored this when it enacted the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA),[119] first by defining "public authority" to include "Indian tribe,"[120] and second by adding new statewide planning requirements that mandate the development of statewide plans which "shall, at a minimum, consider...[t]he concerns of Indian tribal governments having jurisdiction over lands within the boundaries of the State."[121]

The U.S. Department of Transportation issued new regulations on statewide planning on October 28, 1993,[122] which significantly amplify the statutory requirements. These regulations, which apply to both FHWA programs and Federal Transit Authority (FTA) programs, amend the regulations of Title 23, C.F.R., Part 450—Planning Assistance and Standards. Subsection 450.208 prescribes 23 factors that shall be considered, analyzed, and reflected in the planning process products, including: "(23) The concerns of Indian tribal governments having jurisdiction over lands within the boundaries of the State." Subsection 450(a) provides as follows:

> The degree of consideration and analysis of the factors should be based on the scale and complexity of many issues, including transportation problems, land use, employment, economic development, environmental and housing and community development objectives, the extent of overlap between factors and other circumstances statewide or in subareas within the State.

Under Section 450.210, Coordination, each state, in cooperation with participating organizations "such as...Indian tribal governments...shall...provide for a fully coordinated processes," including 13 listed categories such as:

> (5) Transportation planning carried out by the State with transportation planning carried out by Indian tribal governments;
>
> (12) Transportation planning with analysis of social, economic, employment, energy, environmental, and housing and community development effects of transportation actions....

Subsection 450.214(c) provides that in developing the statewide plan, the state shall:

> (2) Cooperate with the Indian tribal government and the Secretary of the Interior on the portions of the plan affecting areas of the State under the jurisdiction of an Indian tribal government....

Section 450.104 defines the key terms "consultation," "cooperation," and "coordination" as follows:

> *Consultation* means that one party confers with another identified party and, prior to taking action(s), considers that party's views.
>
> *Cooperation* means that the parties involved in carrying out the planning, programming and management systems processes work together to achieve a common goal or objective.
>
> *Coordination* means the comparison of the transportation plans, programs, and schedules of one agency with related plans, programs and schedules of other agencies or entities with legal standing, and adjustment of plans, programs and schedules to achieve general consistency.

2. Environmental and Related Issues[123]

a. General.—Whether a specific federal statute of general applicability, such as the National Environmental Policy Act of 1969 (NEPA),[124] applies to activities on Indian lands depends on the intent of Congress.[125] Certainly, such laws will be held to apply where Indians or tribes are expressly covered, but also where it is clear from the statutory terms that such coverage was intended.[126] Where retained sovereignty is not invalidated and there is no infringement of Indian rights, Indians and their property are normally subject to the same federal laws as others.[127] There were no reported cases found where an Indian tribe had successfully challenged applicability of federal environmental laws to Indian lands.

Federal statutory environmental law has been a fertile field for litigation between states and tribes both as to applicability and jurisdiction.[128] Thus far, state environmental laws have been held not to apply to Indian reservations.[129] However, while "[s]tate laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply,"[130] the Supreme Court has not established an inflexible *per se* rule precluding state jurisdiction in the absence of express congressional consent.[131] As the Court said in *New Mexico v. Mescalero Apache Tribe*:[132]

> [U]nder certain circumstances a State may validly assert authority over the activities of nonmembers on a reservation, and...in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members.

But the Court made clear, in *Washington v. Confederated Tribes of the Colville Indian Reservation*,[133] the tribes have no right "to market an exemption" from state law.

b. NEPA Compliance.—NEPA (42 U.S.C Section 4332 [2][c]) is silent on its applicability to Indian country and Indian tribal agencies. By its terms, it applies to the "major federal actions" of federal agencies,[134] and this would include the Department of the Interior and BIA. In *Davis v. Morton*,[135] the court of appeals for the Tenth Circuit addressed the applicability of NEPA to BIA approval of a 99-year lease on the Tesuque Indian Reservation in Santa Fe County, New Mexico. The court of appeals held as follows:

> We conclude approving leases on federal lands constitutes major federal action and thus must be approved according to NEPA mandates. As our court had occasion to consider once before, this Act was intended to include all federal agencies, including the Bureau of Indian Affairs.[136]

Subsequent to this ruling, BIA, in cooperation with the various Indian tribes, began preparing environmental analyses in compliance with NEPA. Although BIA has no specific environmental regulations covering highway rights of way or highway construction, it considers NEPA requirements to be applicable. BIA has issued an NEPA handbook to provide guidance to BIA personnel and others who seek to use Indian lands that are subject to federal approval. Normally, BIA would be the jurisdictional agency, but it may also act as a "cooperating agency"

with another federal agency, such as FHWA, that is acting as "lead agency," under the Council on Environmental Quality regulations.[137]

The Montana Department of Highways has started the practice of entering into a memorandum of understanding with FHWA and the jurisdictional Indian tribe regarding the procedures to be followed in preparation of such environmental impact statements.[138] The *American Indian Law Deskbook* devotes an entire chapter to state-tribal cooperative agreements, giving many examples and representative samples of such agreements, including several relating to environmental matters.[139]

At present, the FHWA/FTA environmental regulations in 23 C.F.R. Part 771, which prescribe the procedures for compliance with NEPA, exempt "regional" transportation plans from preparation of environmental analysis.[140] This exemption is supported by case law.[141] Although the statewide planning regulations previously discussed place great emphasis on, and establish requirements concerning, the environmental effects of transportation decisions, they do not mandate an NEPA environmental analysis. However, given the importance to Indian tribes of reversing the loss of tribal resources and preserving the integrity of tribal lands, state transportation planning and project development will necessitate the use of environmental inventorying and in some cases may need to consider the use of a "tiered" environmental impact statement.

c. Tribal Enforcement Authority for Federal Environmental Statutes other than NEPA.—In *State of Washington Department of Ecology v. United States Environmental Protection Agency*,[142] involving the Resources Conservation and Recovery Act, the court of appeals for the Ninth Circuit noted:

> The federal government has a policy of encouraging tribal self-government in environmental matters. That policy has been reflected in several environmental statutes that give Indian tribes a measure of control over policy making or program administration or both.... The policies and practices of EPA also reflect the federal commitment to tribal self-regulation in environmental matters.

In that case, and in the earlier Ninth Circuit case of *Nance v. Environmental Protection Agency*,[143] which involved Environmental Protection Agency (EPA) delegations to a tribe under the Clean Air Act, the court of appeals approved EPA's development of regulations and procedures authorizing the treatment of Indian tribes on a government-to-government basis, encouraging Indian self-government on environmental matters, notwithstanding the fact that none of the major federal environmental regulatory statutes at that time provided for delegation to tribal governments.

Subsequently, as these and other environmental statutes came before Congress for amendment or reauthorization, Congress expressly provided tribal governments various degrees of jurisdictional authority. Major environmental statutes granting such tribal authority, which may be involved in the development or maintenance of a highway project on an Indian reservation, are as follows:

- Clean Air Act, 42 U.S.C. Section 7401, *et seq.* (eligible tribes may assume primary responsibility for all assumable programs, see Section 7601)
- Safe Drinking Water Act, 42 U.S.C. Section 300f, *et seq.* (eligible tribes may assume primary responsibility for all assumable programs, see Sections 300j-11, 300h-1[e])
- Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. Section 1251, *et seq.* (eligible tribes allowed to establish water-quality standards, non-point source management plans, and issue National Pollutant Discharge Elimination System and Section 404 dredge/fill permits, see Section 1377(e) allowing tribes to be treated as states)
- Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9601, *et seq.*, (Section 9626 provides that tribes are to be treated as states for certain purposes, including notification of release, consultation on remedial actions, access to information, and cooperation in establishing and maintaining national registries.)

Another environmental statute that has not been amended to provide for tribal primacy is the Resources Conservation and Recovery Act, 42 U.S.C. Section 6901, *et seq.* This statute was construed in *State of Washington Department of Ecology v. EPA* not to allow state enforcement on tribal lands, but rather EPA enforcement.

d. Other Federal Laws Applicable to Environmental Concerns of Indians.—In addition to the specific environmental statutes noted earlier, the following federal laws should also be considered when planning a project on Indian lands.

(1) American Indian Religious Freedom Act of 1978 (AIRFA).[144]—AIRFA provides that it shall be the policy of the United States to protect and preserve for the American Indian, Eskimo, Aleut, and Native Hawaiian the inherent right of freedom to believe, express, and exercise their traditional religions, including but not limited to access to religious sites, use and possession of sacred objects, and freedom to worship through ceremonies and traditional rites. Federal agencies are directed to evaluate their policies and procedures to determine if changes are needed to ensure that such rights and freedoms are not disrupted by agency practices. The court of appeals for the D.C. Circuit determined that there is a compliance element in this act, requiring that the views of Indian leaders be obtained and considered when a proposed land use might conflict with traditional Indian religious beliefs or practices and that unnecessary interference with Indian religious practices be avoided during project implementation on public lands, although conflict does not bar adoption of proposed land uses where they are in the public interest.[145] There is presently pending in Congress the Native American Free Exercise of Religion Act of 1993[146] to extend the coverage of AIRFA.

(2) Archaeological Resources Protection Act of 1979.[147]—This act provides for the protection and management of archaeological resources. It specifically requires that the affected Indian tribe be notified if proposed archaeological investigations would result in harm to or destruction of any location considered by the tribe to have religious or cultural importance. This act directs consideration of AIRFA in the promulgation of uniform regulations.

(3) National Historic Preservation Act of 1966.[148]—This act addresses preservation of historic properties, including historical, archaeological, and architectural districts, sites, buildings, structures, and objects that are eligible for the National Register of Historic Places. In some cases, properties may be eligible in whole or in part because of historical importance to Native Americans, including traditional religious and cultural importance. Federal agencies must take into account the effects of their undertakings on eligible properties.

(4) Section 4(f) of the Department of Transportation Act of 1966.[149]—Section 4(f) provides a policy of making special effort to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. It mandates that transportation programs and projects

may use such land, where determined by state or local officials to be significant, only if there is no feasible and prudent alternative and all possible planning to minimize harm has taken place.

C. Highway Construction Activities

1. Indian Employment and Contracting Preference

a. General.—At least as early as 1834, the federal government accorded some hiring preference to Indians.[150] Since that time, Congress has continued to enact such preferences.[151] The Indian Reorganization Act of 1934, also known as the Wheeler-Howard Act, 48 Stat. 984, 25 U.S.C. Section 461 *et seq.*, accords an employment preference for qualified Indians in any position in BIA, without regard to the civil-service laws.[152]

Title VII of the Civil Rights Act of 1964, 78 Stat. 253, was the first major federal statute prohibiting discrimination in private employment on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. Section 2000e-2(i). However, Sections 701(b) and 703(i) of this act expressly exempted from coverage the preferential employment of Indians by Indian tribes or by industries located on or near Indian reservations.[153] The Equal Employment Opportunity Commission (EEOC) regulations relating to work on or near Indian reservations define the word "near" to include "all that area where a person seeking employment could reasonably be expected to commute to and from in the course of a work day."[154] It should be noted that these regulations expressly prohibit extending such preferences on the basis of tribal affiliation.[155]

The Supreme Court addressed the constitutionality of Indian preference in *Morton v. Mancari*, 417 U.S. 535 (1974). The case involved a challenge by non-Indian employees of BIA to the employment preference accorded Indians by the Indian Reorganization Act. They contended that the preference contravened the antidiscrimination provisions of the Equal Employment Opportunities Act of 1972[156] and constituted invidious racial discrimination in violation of the due process clause of the Fifth Amendment (*Bolling v. Sharpe*, 347 U.S. 497 (1954)). The Court rejected both contentions and upheld the Indian hiring preference:

> Contrary to the characterization made by appellees, this preference does not constitute "racial discrimination." Indeed, *it is not even a "racial" preference.* [footnote 24].... The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities.... On numerous occasions this Court *specifically has* upheld legislation that singles out Indians for particular and special treatment. [citations omitted]...As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process.[157]

In the footnote to the preceding quotation, the Court noted that the preference was political rather than racial:

> The preference is not directed towards a "racial" group consisting of "Indians"; instead, it applies only to members of "federally recognized" tribes. This operates to exclude many individuals who are racially to be classified as "Indians." In this sense, the preference is political rather than racial in nature.[158]

The Buy Indian Act,[159] 25 U.S.C. Section 47, provides that "[s]o far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior." However, in a 1980 decision, the Supreme Court held in *Andrus v. Glover Construction Co.*[160] that this act does not authorize BIA to enter into road construction contracts with Indian-owned companies without public advertising of such contracts for competitive bids pursuant to the Federal Property and Administrative Services Act of 1949, 41 U.S.C. Sections 252(e) and 253.

The Indian Self-Determination and Educational Assistance Act of 1975[161] directs the Secretary of the Interior and the Secretary of Health and Human Services to contract with tribal organizations for specified programs administered by their departments for the benefit of Indians, including construction programs.[162] Relative to subcontracting, 25 U.S.C. Section 450e(b)(2) requires all federal agencies, to the greatest extent practicable, to give preference in the awarding of subcontracts to Indian organizations and Indian-owned economic enterprises in any contracts with Indian organizations or for the benefit of Indians.[163] In connection with employment, 25 U.S.C. Section 450e(b)(1) requires all federal agencies, to the greatest extent practicable, to give preference in opportunities for training and employment to Indians in any contracts with Indian organizations or for the benefit of Indians.

b. In the Federal Highway Program.—(1) Federal Lands Highways Program. The Surface Transportation Assistance Act of 1982[164] amended Title 23 U.S.C. Section 204 to establish a Federal Lands Highway Program, which includes funding for the construction or improvement of "Indian reservation roads."[165] Under 23 U.S.C. Section 204(b), a preference may be given for Indian labor on those projects funded by Indian reservation road funds. An exception to competitive bidding requirements for contracts funded with Indian reservation road funds is provided in 23 U.S.C. Section 204(e), making these contracts subject to the Buy Indian Act and the Indian Self-Determination and Education Assistance Act. Therefore, on such projects, there is authority to contract directly with Indian tribes or Indian contractors and to require preferential hiring of Indians.

On other direct federal highway projects, not funded by Indian reservation road funds, the authority is limited to use of Section 8(a) set-asides to qualified Indian contractors[166] and the use of affirmative-action requirements for contractors to use good-faith efforts to hire minorities, such as Indians, using preestablished hiring goals. Relative to subcontracting, the FHWA Federal Lands Highway Program sometimes uses a Federal Acquisition Regulation clause, which encourages contractors to subcontract with Indian-owned firms by paying additional (up to 5%) of the added costs of such subcontracts.[167]

(2) Federal-Aid Highway Program. (a) Indian Employment Preference. Congress, in enacting the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA),[168] added a new Subsection (d) to 23 U.S.C. Section 140:

> (d) INDIAN EMPLOYMENT AND CONTRACTING. Consistent with section 703(i) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(i)), nothing in this section shall preclude *the preferential employment* of Indians living on or near a reservation on projects and contracts on Indian reservation roads. The Secretary shall cooperate with Indian tribal governments and the States to implement this subsection.

Prior to the enactment of 23 U.S.C. 140(d), in early 1985, FHWA had interpreted Sections 112 and 140 of Title 23 U.S.C. as precluding Indian hiring preference on any federal-aid highway contract.[169] Indian hiring preference could not be "imposed" by a state as a condition to awarding a federal-aid highway contract, but federal-aid contractors could voluntarily give such preferences.[170] However,

Congress enacted Section 140(d) to clarify that Indian hiring preference was permissible on federal-aid highway projects.

Congress expanded Section 140(d) in ISTEA by adding the following new sentence:

> States may implement a preference for employment of Indians on projects carried out under this title near Indian reservations.[171]

As written and as explained in the House Committee Report[172] this amendment was intended to permit states to extend Indian hiring to all Indians for any projects *near* Indian reservations, even though such projects were not technically Indian reservation roads.

Following passage of ISTEA, FHWA issued FHWA Notice, N 4720.7, "Indian Preference in Employment on Federal-aid Highway Projects on and near Indian Reservations," dated March 15, 1993. The purpose of this notice was to consolidate all previous guidance for FHWA field officials, state highway agencies, and their subrecipients and contractors regarding the allowance for Indian preference in employment on projects on and near Indian reservations. The notice covers the following:

> (1) Eligible projects for Indian employment preference consideration (those on Indian Reservation Roads (IRRs), those not on IRRs, but near reservations and "other Indian lands");
>
> (2) Eligible and "targeted" employees for Indian employment preference;
>
> (3) Indian employment preference goal setting and revision, including directions that State and tribal representatives are to confer during project development and make determinations regarding employment goals, excepting the contractor's "core crew;"
>
> (4) Guidelines for FHWA participation in a TERO tax applicable to off reservation situations.

(b) Indian Preference in Contracting. The Indian Self-Determination Act provisions for Indian preference in contracting and subcontracting has caused much confusion relative to the Federal-Aid Highway Program. This is due, in part, to the fact that Indian tribal officials believed its provisions applied to all federal highway construction funds, including the grant-in-aid to the states for highway construction. The confusion is understandable given the fact that certain earmarked funds from the Highway Trust Fund are subject to the Indian Self-Determination Act (i.e., Indian reservation road funds administered under 23 U.S.C. Section 204, previously discussed). However, no contracting preference for Indian-owned firms is either authorized or mandated under the Federal-Aid Highway Program.

The question was addressed by FHWA in a legal memorandum to the FHWA Montana division administrator in connection with a letter from the tribal attorney for the Blackfeet Tribe.[173] The Blackfeet attorney took the position that 23 U.S.C. Section 140(d), Indian Employment and Contracting, seemed to extend preference to Indians living on or near a reservation relative to contract awards. The FHWA response was that Section 140(d) does not authorize Federal-Aid Highway Program grantees to use Indian contractor preference, but they must follow competitive bidding procedures mandated by 23 U.S.C. Section 112 and its implementing regulations in 23 C.F.R. Section 635. However, it was pointed out that a complete set-aside procedure may be followed by state grantees for disadvantaged business enterprises, including but not limited to Indian-owned firms, in accordance with 49 C.F.R. Section 23.45(k).[174]

2. Tribal Employment Rights Ordinances

a. Background.—The genesis of Tribal Employment Rights Ordinances (TEROs) was the failure of construction contractors to live up to Indian hiring commitments that had been made to the Navajo Tribe in connection with construction of the Salt River generating plant in Arizona. Based on this experience in the early 1970s, the EEOC conducted a 2-year study that concluded that "tribes had the sovereign right to enforce employment requirements on employers conducting business on the reservation." By 1978, EEOC, working through a consulting firm, funded the design and testing of the first TEROs, and assisted 22 tribes to enact TEROs.[175]

One of the more significant products of the EEOC involvement in TERO development was the preparation and issuance of the manual *Indian Employment Rights—A Guide to Tribal Action,* by Daniel A. Press. The 1979 revised edition of the manual, more than 200 pages long, includes model tribal ordinances and a set of guidelines for a tribal employment rights office. The shorter version TERO was enacted by several tribes in the late 1970s and early 1980s, and it was this version that state highway departments began to see enforced against federal-aid highway contractors.

This model ordinance establishes the requirement for Indian-hiring preference using the following language:

> All employers operating within the exterior boundaries of the _____ reservation are hereby required to give preference to Indians in hiring, promotion, training, and all other aspects of employment, and in subcontracting. Said employers shall comply with the rules, regulations, and guidelines of employment rights office that set out the specific obligations of the employer in regard to Indian preference.

The ordinance requires the "employer who has a collective bargaining agreement" to obtain a written agreement from the union(s) stating that the union(s) shall comply with the Indian-preference laws, and so forth. Failure of the employer to comply with the ordinance or any implementing rules on employment rights or to get the required union agreements is subject to sanctions that include, but are not limited to the following:

> Denial of the right to commence business on the reservation, civil fines, suspension of employer's operation, denial of the right to conduct any further business on the reservation, payment of back pay or other relief to correct harm done to aggrieved Indians, and the summary removal of the employees hired in violation of the Tribes' employment rights requirements.

The ordinance provides that these sanctions are to be imposed by the TERO director after opportunity for an evidentiary hearing. In addition, the TERO director is authorized to issue rules and regulations to implement the ordinance, and to:

> 1. Impose numerical hiring goals and timetables;
>
> 2. Require establishment/participation in training programs;
>
> 3. Establish a tribal hiring hall with a requirement that no covered employer may hire a non-Indian until the hall certifies that no qualified Indian is available;
>
> 4. Prohibit use of qualification criteria that serve as barriers to Indian employment unless clearly demonstrated to be a business necessity;
>
> 5. Enter into agreements with unions to insure union compliance;

6. Require employers to give preference in award of contracts and subcontracts to tribal or other Indian-owned firms;

7. Establish counseling programs to aid Indians to retain employment and to require employers to participate therein.

Finally, the ordinance imposes an employment rights fee to raise revenue for the operation of the TERO Office. For construction contracts of $100,000 or more the recommended fee is 0.5 percent of the total amount of the contract. This tax has become known as the TERO tax.

b. FHWA and State Highway Agency Treatment of TERO.—During the early 1980s the states employed a variety of methods to recognize or give notice in their contracts of TERO requirements applicable to an advertised contract for highway construction on an Indian reservation. Some states only advised bidders in the notice to bidders or other contract documents,[176] while others required contractors to comply with the TERO as a contractual obligation.[177] Initially, FHWA regional offices, while recognizing the authority of the tribes to enforce TEROs against contractors, cautioned the states about incorporating the ordinance into their highway construction contracts as a state-enforced provision, recommending instead that an informational notice of TERO requirements be placed in the invitation for bids.

As previously noted, in early 1985, the Federal Highway Administration took the position that the imposition and administration of TEROs was to be left to the contractor and the tribe, and that such preference programs were not to be included either directly or indirectly in federal-aid highway contracts. However, the agency did not object to the states' noncoercive mention in their federal-aid bid packages of the provisions of 41 C.F.R. 60-1.5(a)(6), which stated that it was not a violation of federal equal employment opportunity policies for contractors to give preference in employment to Indians in connection with projects on or near an Indian reservation.[178] This position changed after the addition of 23 U.S.C. Section 140(d).

The Senate Committee Report on *STURAA*[179] encouraged state departments of transportation to meet with tribal employment rights offices and contractors prior to bid letting on a project to develop workable and acceptable employment agreements, including agreed employment goals, prior to bid letting. Following enactment of STURAA, with the addition of 23 U.S.C. Section 140(d), and consistent with the Senate report language, the Federal Highway Administrator, in a memorandum dated October 6, 1987, directed as follows:

> ...FHWA field offices should encourage States to meet with Indian tribes and their Tribal Employment Rights Offices (TERO's) to develop contract provisions for Federal-Aid highway projects which will promote employment opportunities for Indians.
>
> To develop a workable and acceptable project Indian employment goal, the State should confer with tribal representatives during project development. In setting the goal, consideration should be given to the availability of skilled and unskilled Indian resources, the type of contract, and the potential employment requirements of the contractor in addition to its core-crew. Once established, the goal should only be changed by the State after consultation with the Indian tribal representative and the contractor and after consideration of good faith efforts to achieve the original goal. Sanctions for failure to meet the employment goal should be determined in advance and be made a part of the contract to facilitate enforcement.

This memorandum stated that FHWA would not recognize or allow any contract preference for Indian-owned firms, except through the Department of Transportation's Disadvantaged Business Enterprise (DBE) program.[180] In addition, FHWA would participate with federal-aid funds in the cost of TERO taxes, as with other state and local taxes, provided they did not discriminate or otherwise single out federal-aid projects.

A 1988 FHWA memorandum advised field offices that relative to TERO taxes, FHWA would participate in a tax on the full contract amount of a project not wholly within the reservation if this was state policy for nonfederal-aid projects. It also said that FHWA participation was not limited to a TERO tax of 1 percent, provided the percentage of tax was the same for nonfederal-aid projects.[181] In addition, the memorandum advised that before FHWA authorizes advertisement of a contract, agreements on the TERO costs and requirements must be reached and the requirements must be clearly set forth in the bidding proposal. Despite this guidance, such agreements have not been considered mandatory in practice.

The FHWA guidance of 1987 and 1988 was consolidated into FHWA Notice N-4720.7, dated March 15, 1993.

c. Examples of Problems under TERO Agreements.—(1) The Oregon Department of Transportation (ODOT) presently deals directly with Indian tribes and enters into TERO agreements that set hiring goals, TERO tax, and other matters. In attempting to reach agreement relative to rehabilitation projects on I-84 on the Umatilla Reservation, the tribe demanded two requirements that ODOT would not accept and make a part of its contracts. The two requirements are as follows:

> 1. All suppliers supplying material for the contractors and subcontractors would be subject to Indian hiring preference for any new hires;
>
> 2. The tribe was to have a veto power over all DBE firms to be used by the prime contractor;

Although not agreeing to these provisions, ODOT put out an addendum to all prospective bidders communicating a statement prepared by the tribe relative to the tribe's position on these matters.

(2) Several tribes have sought to require exclusive use of Indian-owned or Indian-furnished borrow material on federal-aid projects, using either the TERO agreement or specific ordinances. The FHWA's Office of Engineering addressed this problem in an April 15, 1993, memorandum.[182] Although not addressing the jurisdictional question of whether the tribes had the authority to make such requirements, FHWA advised that its policies, in 23 C.F.R. 635.407, must be complied with regardless of who furnishes the material. Section 635.407 requires that the contractor is to furnish all materials to be incorporated into the project, using sources of his or her own choice, unless the state highway agency, with FHWA concurrence, makes a public-interest finding that a mandatory furnished source is to be used. The memorandum concluded:

> The above described policies apply whether the materials are furnished by the SHA [state highway agency], or, as in the subject case, a SHA designated Indian-owned source. Whether the designated material source is privately owned, or Indian-owned and whether or not is the result of a local Indian ordinance has no affect on our policy. (definition added)

It should be noted that where a state or contractor is intending to use Indian lands that are under federal trust ownership, it must get prior approval of the secretary of the interior. This would apply to both tribal and allotted trust lands.[183]

d. Litigation of TEROs.—Litigation testing the authority of Indian tribes to enforce TEROs has been quite limited. The only reported appellate case is *FMC v.*

Shoshone-Bannock Tribes, et al.,[184] a 1990 decision of the court of appeals for the Ninth Circuit upholding a TERO, which will be discussed later. However, the first case testing a TERO was *Empire Sand & Gravel Co., Inc., v. Crow Tribe of Indians* (Jan. 6, 1986), filed by several highway construction contractors against the Crow Tribe and the Montana Department of Highways, in connection with several Interstate 90 projects within the Crow Reservation.[185]

The highway contractor plaintiffs in Empire challenged Montana's April 4, 1983, agreement with the Crow Tribe, previously discussed,[186] whereby contractors would be required to give hiring preference to Indians, as contravening 23 U.S.C. Section 140. In addition, they challenged the authority of the Crow Tribe to enforce TERO and the TERO tax against contractors constructing a federal-aid highway. They sought an injunction against the Crow Tribe and the Crow Tribal Employment Rights Office from attempting to impose Indian preference and other provisions of the TERO, as well as damages refunding the TERO tax that had been collected.

The U.S. District Court dismissed the case on cross-motions for summary judgment, stating:

> The facts make clear that plaintiffs bid on the highway construction projects and entered into contracts with the State with full knowledge of an Indian preference clause because the clause was a part of the bid specifications as well as the contracts. Plaintiffs entered into agreements with the Crow Tribe to comply with Crow Tribal Resolution No. 79-27 and agreed to pay certain amounts to the Crow T.E.R.O. The contracts and agreements were consensual and have been fully performed.... [T]he State and the Tribe have detrimentally relied on their agreement. Plaintiffs have neither shown that there is a present case and controversy nor that they were injured so as to have standing.

The *FMC* case[187] involved the enforcement of TERO EMPT-80-54, enacted July 22, 1980, by the Shoshone-Bannock Tribes, applying to all employers within the Fort Hall Reservation in southeastern Idaho, including those businesses owned by non-Indians operating on fee land. The case presented the question of the extent of power Indian tribes have over non-Indians acting on fee land located within the confines of a reservation. The district court held that the tribes did not have such power, but the Ninth Circuit reversed the decision and upheld the tribe's jurisdiction, affirming the decision of the Tribal Appellate Court.

The facts of FMC involved its manufacturing plant on fee land where the company manufactured elemental phosphorus. FMC was the largest employer on the reservation, with 600 employees. At the time, FMC got all of its phosphate shale (one of three primary raw materials required) from mining leases located within the reservation and owned by the tribes or individual Indians. Upon notification of the passage of the TERO, FMC objected to the ordinance's application to its plant. However, after negotiations with the tribe, FMC entered into an employment agreement based on a 1981 TERO that resulted in a large increase in the number of Indian employees at FMC. In late 1986, the tribes became dissatisfied with FMC's compliance and filed civil charges in tribal court. FMC immediately challenged the tribal court's jurisdiction in federal district court and got an injunction from enforcement of any order against FMC until the tribal court had an opportunity to rule on the tribe's jurisdiction over FMC. The tribal court then found that the tribes had jurisdiction over FMC based on *Montana v. United States*,[188] and the court held that the company had violated the TERO. The tribal appellate court affirmed those rulings and entered into a compliance plan that required 75 percent of all new hires and 100 percent of all promotions to be awarded to qualified Indians, mandated that one-third of all internal training opportunities be awarded to local Indians, and levied an annual TERO fee of approximately $100,000 on FMC. The federal district court preliminarily enjoined enforcement of this compliance order, and in April 1988, it reversed the tribal appellate court.

The Ninth Circuit noted that the standard of review of a tribal court decision regarding tribal jurisdiction "is a question of first impression among the circuits." It further noted that the leading case on the question of tribal court jurisdiction is *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985), which established that a federal court must initially "stay its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made," allowing a full record to be developed in the tribal court before either the merits or any question concerning appropriate relief is addressed.[189] After further reviewing the opinion in *Farmers*, the court of appeals determined that the standard of review would be one "clearly erroneous" as to factual questions and *de novo* on federal legal questions, including the question of tribal court jurisdiction.

In its review of tribal jurisdiction, the court of appeals cited Montana as the leading case on tribal jurisdiction over non-Indians and quoted the two circumstances in which the Supreme Court said 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:

> [1] A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements.
>
> [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.[190]

The court of appeals found that FMC had entered into "consensual relationships" with the tribe or its members and that *Montana*'s first test was met:

> FMC has certainly entered into consensual relationships with the Tribes in several instances. Most notable are the wide ranging mining leases and contracts FMC has for the supply of phosphate shale to its plant. FMC also explicitly recognized the Tribes' taxing power in one of its mining agreements. FMC agreed to royalty payments and had entered into an agreement with the Tribes relating specifically to the TERO's goal of increased Indian employment and training. There is also the underlying fact that its plant is within reservation boundaries, although, significantly, on fee and not on tribal land. In sum, FMC's presence on the reservation is substantial, both physically and in terms of the money involved.... FMC actively engaged in commerce with the Tribes and so has subjected itself to the civil jurisdiction of the Tribes. See, e.g., *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587 (9th Cir. 1983).

The court of appeals disagreed with the district court and FMC that these connections between the company and the tribes, although substantial, did not provide a sufficiently close "nexus" to employment to support the TERO, citing *Cardin v. De La Cruz*,[191] and pointed out that *Cardin* contained no explicit requirement of a nexus.[192] The case was remanded to the tribal court to "give FMC an opportunity to challenge the application of the TERO under the Indian Civil Rights Act, 25 U.S.C. Section 1302."

3. *Tribal Jurisdiction Affecting Highway Contractors*

a. General.—"Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty."[193] One feature of this authority, previously noted, is a tribe's power to exclude nonmembers entirely or to condition their presence on the reservation.[194] In addition, as the Supreme Court stated in *Montana*, referring to this tribal inherent sovereign power over non-Indians, the tribe can "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."

b. Criminal Jurisdiction.—The Supreme Court clearly stated in *Oliphant* that an Indian tribe does not have criminal jurisdiction to try non-Indians in the absence of express delegation by Congress.[195] In *Duro v. Reina*, Justice Kennedy, writing for the majority stated:

> We hold that the retained sovereignty of the tribe as a political and social organization to govern its own affairs does not include the *authority to impose criminal sanctions* against a citizen outside its own membership.[196]

The Oliphant decision indicated that at the time the case was decided at least 30 tribes had been asserting criminal jurisdiction over non-Indians, with many of them relying on implied consent ordinances.[197] Notice of these "implied consent" laws were posted on signs at entry points to the reservations. However, despite the "consensual relationship" language in *Montana*, the Court did not adopt a theory of implied consent in either *Oliphant* or *Duro*, to support *criminal* jurisdiction over nonmembers of the tribe.[198] The question now is whether the courts will accept or reject such implied consent for civil jurisdiction.

c. Civil Jurisdiction.—The Indian tribes have been recognized by the Supreme Court as having "a broad range of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest."[199] Even though tribes do not have criminal jurisdiction over non-Indians, civil disputes between Indians and non-Indians arising out of transactions on a reservation are exclusively within tribal court jurisdiction.[200] For example, in *Williams v. Lee* the Supreme Court upheld the exclusive jurisdiction of the Navajo Tribal Court over the collection of a debt owed by Indians to a non-Indian merchant:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.[201]

This civil jurisdiction is enforceable through tribal courts,[202] where they exist, so that where a tribe has the power to regulate activities of non-Indians, they may sue them in tribal court in connection with such activities.[203]

d. Consent and "Implied Consent" to Tribal Court Jurisdiction in Highway Construction Activities.—(1) Example of a "Consent" Ordinance. The South Dakota Department of Transportation (SDDOT) and the Rosebud Sioux Tribe (RST) were able to resolve a troublesome conflict in 1989, which had to do with the tribe's use of an express consent provision in the tribe's Business Licensing Code. This regulation required that contractors, as a condition to obtaining a mandatory business license for doing business on the reservation, consent to jurisdiction of the RST tribal court and to service of process, for all tax laws, health and sanitation laws, and consumer protection laws, as well as Indian employment and contracting preference laws.[204]

SDDOT advised RST that it did not object to its contractors buying the tribe's $50 business license, but unless the tribe agreed to waive the consent to jurisdiction clause it would withdraw from advertisement certain federal-aid highway projects scheduled for construction on the reservation. The tribe strongly wanted to retain the consent to jurisdiction as a matter of tribal sovereignty. South Dakota Governor Mickelson and Attorney General Tellinghuisen were equally as strong in defending retention of state court jurisdiction over contractual obligations arising out of the SDDOT highway construction contracts, including obligations to provide comprehensive insurance, performance and payment bonds, worker's compensation, unemployment tax, sales and service taxes, and state and federal equal employment opportunities laws. The state believed that none of these obligations could reasonably be ceded to the tribal court. In addition, at that time, the FMC decision had not been made by the Ninth Circuit, and there were serious reservations about the validity of the TERO.

The tribe initially refused to waive the consent provision, and SDDOT withdrew advertisement of the projects. Later, the tribe offered, and SDDOT accepted, a compromise that relieved the SDDOT contractors from signing a statement of consent to tribal jurisdiction, allowed the contractors to retain the right to assert that the tribe lacked jurisdiction, and agreed that the tribe was not waiving its jurisdiction. The projects were completed on a cooperative basis, with the TERO provisions being considered in full force. In this posture, any disputes over tribal jurisdiction would have been resolved under the procedures set out in the *Farmers* case, with the tribal court first determining jurisdiction and developing a record, with any further review going to federal court.[205]

(2) Example of "Implied Consent."[206]—In the fall of 1993, the Oglala Sioux Tribe posted the following sign within the right of way of South Dakota Highway 407:

> ENTERING PINE RIDGE
> UPON ENTERING YOU DO
> IMPLY CONSENT TO JURISDICTION
> OF OGLALA SIOUX TRIBE ORD #9312

Ordinance 93-12 was enacted by the Oglala Sioux Tribe in July 1993 to establish jurisdiction of the tribal court based on consent to jurisdiction. This ordinance revised the tribe's Law and Order Code relating to jurisdiction of the tribal court to provide as follows:

> *Section 20. JURISDICTION*
>
> The Oglala Sioux Tribal Court shall have jurisdiction of all suits wherein the defendant is a member of the Oglala Sioux Tribe and of *all other suits between members and nonmembers who consent to the jurisdiction of the tribe.* (emphasis added)

The ordinance adopted two new sections to the code, including Section 20(a) Implied Consent to Tribal Jurisdiction by Non-Members of the Oglala Sioux Tribe, which provides as follows:

> Any person who is not a member of the Oglala Sioux Tribe shall be deemed as having consented to the jurisdiction of the Oglala Sioux Tribe, by doing personally, through an employee, through an agent or through a subsidiary, any of the following acts within the exterior boundaries of the Pine Ridge Indian Reservation.
> 1. The transaction of any business.

2. The commission or omission of any act which results in a tort action.

3. The ownership, use or possession of any property situated within the exterior boundaries of the Pine Ridge Reservation.

4. Engaging in any employer-employee relationship.

5. Leasing or permitting of any land or property.

6. Residing on the Pine Ridge Indian Reservation.

7. Commission of any act giving rise to claims for spousal support, separate maintenance, child support, child custody, divorce or modification of any decree of divorce or separate maintenance proceeding.

8. Any contractual agreement entered into within the exterior boundaries of the Pine Ridge Indian Reservation.

The implications for state highway contractors entering the reservation under this ordinance are many. The uncertainty over what, if any, litigation costs may be involved is likely to cause bidders to protect themselves by including a large contingency bid amount.

VI. LEGAL ISSUES RELATING TO THE MAINTENANCE OF HIGHWAYS ACROSS INDIAN LANDS

A. State Jurisdiction over Highways Across Indian Lands

1. General

Previously discussed in Section IV, B, 1, b of this report was the question of whether a grant of right of way to construct, operate, and maintain a highway was effective to destroy Indian title so as to give complete power to regulate the use and occupancy of that highway against all the public, including the tribal Indians. The supreme courts of Arizona, New Mexico, and Wisconsin have held that Indian title is not extinguished, and the granting of such right of way is not a grant of general jurisdiction.[207] The U.S. District Court in *In re Fredenberg,*[208] later followed in *Application of Denet-Claw* and *New Mexico v. Begay*, held that Congress had asserted "exclusive jurisdiction...as to crimes committed by Indians on the rights of way within reservations," referring to 18 U.S.C. Section 1151. The Ninth Circuit, in *Ortiz-Barraza v. United States,*[209] agreed, holding that "[r]ights of way running through a reservation remain part of the reservation and within the territorial jurisdiction of the tribal police."

Although the dicta by the Seventh Circuit in *Konaha v. Brown*[210] indicated there was some "right to maintain a highway...limited to such penal provisions as served to protect and preserve the highway, such as speeding, impairing the highway, etc.," subsequent cases have not expanded this language into any established precedent.[211]

The opinion of Justice O'Connor, joined by five other justices, in *Rice v. Rehner*[212] rejected the view that the states are absolutely barred from exercising jurisdiction over tribal reservations and members.[213] She noted that the decisions of the Court concerning state regulation of activities in Indian country had not been static since the Marshall decision in *Worcester v. Georgia* and that "'Congress has to a substantial degree opened the doors of reservations to state laws in marked contrast to what prevailed in the time of Chief Justice Marshall,' *Organized Village of Kake v. Egan*, 369 U.S. 60, 74 (1962)." Justice O'Connor further noted that "'[E]ven on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law.' *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)." The Rice opinion states:

> Although "[f]ederal treaties and statutes have been consistently construed to reserve the right of self-government to the tribes," ...our recent cases have established a "trend...away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption."(p.718) ... We do not necessarily require that Congress explicitly pre-empt assertion of state authority insofar as Indians on reservations are concerned, but we have recognized that any applicable regulatory interest of the State must be given weight and 'automatic exemptions as a matter of constitutional law' are unusual.(p.719) ...When we determine that tradition has recognized a sovereign immunity in favor of the Indians in some respect, then we are reluctant to infer that Congress has authorized the assertion of state authority in that respect 'except where Congress has expressly provided that State laws shall apply.'(p.720) ... Repeal by implication of an established tradition of immunity or self-governance is disfavored.... If, however, we do not find such a tradition, or if we determine that the balance of state, federal, and tribal interests so requires, our pre-emption analysis may accord less weight to the "backdrop" of tribal sovereignty. (citations omitted).

The Supreme Court of Wisconsin relied on the analysis and principles established in *Rice* in *County of Vilas v. Chapman,*[214] a 1985 decision holding that Vilas County had jurisdiction to enforce a noncriminal traffic ordinance against a member of the Lac du Flambeau Bank of Lake Superior Chippewa Indians for an offense occurring on a public highway within the boundaries of a reservation. The court went through a three-step process as outlined in *Rice*:

> 1. Whether the Tribe had a tradition of tribal self-government in the area of traffic regulation on Highway 47 within the reservation;[215]
>
> 2. An evaluation of the balance of federal, state, and tribal interest in the regulation of Highway #47;[216]
>
> 3. Whether the federal government had preempted state jurisdiction to regulate Highway 47 within the Lac du Flambeau Reservation.[217]

The Wisconsin Court, while noting that it had found a tradition of traffic regulation by the Menominee Tribe in the *Webster* case, found in marked contrast that the Lac du Flambeaus had no motor vehicle code in effect at the time of the offense and therefore no tradition of self-government in this area (at the time of this decision the tribe had established a traffic code). In balancing the federal, state, and tribal interest, the Supreme Court of Wisconsin found that the state had a dominant interest in regulating traffic on Highway 47 against both Indians and other users of public highways. It found no federal preemption of state jurisdiction.

However, in *Confederated Tribes of the Colville Reservation v. State of Washington,*[218] the court of appeals for the Ninth Circuit held Washington's speeding statute not enforceable on public roads within the reservation because, under the state's law, the offense of speeding was classified as a civil infraction, rather than a criminal offense. The Ninth Circuit noted that concern for protecting Indian sovereignty from state interference prompted courts to develop the criminal/prohibitory–civil/regulatory test (*United States v. Dakota,* 796 F.2d 186, 188 (6th Cir. 1986), under which civil infractions would usually remain under Indian jurisdiction). The Ninth Circuit decision rejected Washington's argument that uniformity in highway safety laws required state jurisdiction, "at least where the Tribes have shown their own highway safety laws and institutions are adequate

for self-government. *Cf. County of Vilas v. Chapman*, 122 Wis.2d 211, 361 N.W.2d 699...." [219] Here, unlike the Vilas case, the court found that the tribe had and enforced a traffic code.

There are good reasons why the *Rice* principles and the *County of Vilas v. Chapman* case have not been relied on by states to assert jurisdiction over traffic cases on state highways within Indian reservations in the intervening 10 years. One reason is that several states had already been given or had assumed jurisdiction in Indian country pursuant to Public Law 83-280. Another reason is that many tribes have established and enforce their own traffic codes on highways within their reservations. Still another reason is that many tribes have entered into agreements with the states where they are located to cross-deputize state and tribal law enforcement officers, or to give concurrent jurisdiction to state officers, for enforcement of traffic violations and other laws.[220] However, there may be areas of regulation, such as size and weight enforcement, that do not receive adequate attention due to certain traffic code or enforcement "voids."

2. *State Jurisdiction Under Public Law 280*[221]

The period between 1943 and 1961 is often referred to as the "termination era" in the history of federal Indian law.[222] The official congressional policy of termination was established by House Concurrent Resolution 108 in 1953,[223] under which 109 Indian tribes and bands were terminated.[224] One result of these laws was that thousands of Indians and millions of acres of Indian land came under state jurisdiction.[225]

Another product of this termination policy was enactment of Public Law 83-280[226] (hereinafter Pub. L. No. 280), the only federal law extending state jurisdiction to Indian reservations generally.[227] This act mandatorily delegated civil and criminal jurisdiction over reservation Indians to 5 states (California, Minnesota, Nebraska, Oregon, and Wisconsin)—the "mandatory" states. A sixth mandatory state, Alaska, was added in 1958.[228] In addition, the act authorized the remaining states the option of assuming such jurisdiction.[229] In 1968, based on Indian concerns, Congress amended Pub. L. No. 280[230] to provide that there had to be tribal consent to state jurisdiction and that the United States could accept a "retrocession" of any jurisdiction previously acquired under Pub. L. No. 280.[231] Only 10 of the 44 "option" states assumed jurisdiction under Pub. L. No. 280.[232] By 1992, 6 states had retroceded jurisdiction to some extent.

Pevar provides a table showing the jurisdiction delegated to or assumed by states under Pub. L. No 280 (see Table 1).[233]

3. *State Jurisdiction Under Other Congressional Acts*

Several laws have been enacted conferring state jurisdiction over particular tribes. Oklahoma and New York are examples of states that have been given extensive jurisdiction.[235] New York, for example, has been given jurisdiction over "all offenses committed by or against Indians on Indian reservations within the State."[236] A series of court decisions in the past 10 years have recognized the Oklahoma tribes as having the powers of local self-government possessed by other tribes and cast doubt as to the State of Oklahoma's general criminal and civil jurisdiction.[237] Pevar discusses these laws and the special status of certain Indian groups, including the Pueblos of New Mexico, the Alaska Natives, the Oklahoma Indians, the New York Indians, and "nonrecognized tribes," in Chapter XV of his book.

TABLE 1. JURISDICTION DELEGATED TO OR ASSUMED BY STATES

STATE	EXTENT OF JURISDICTION
	Mandatory States
Alaska	All Indian country within the state.
California	All Indian country within the state.
Minnesota	All Indian country within the state, except the Red Lake Reservation.
Nebraska	All Indian country within the state.
Oregon	All Indian country within the state, except the Warm Springs Reservation.
Wisconsin	All Indian country within the state, except the Menominee Reservation.
	"Option" States
Arizona	All Indian country within the state, limited to enforcement of the state's air and water pollution control laws.
Florida	All Indian country within the state.
Idaho	All Indian country within the state, limited to the following subject matters: compulsory school attendance; juvenile delinquency and youth rehabilitation; dependent, neglected, and abused children; mental illness; domestic relations; operation of motor vehicles on public roads.
Iowa	Only over the Sac and Fox Indian community in Tama County, limited to civil and some criminal jurisdiction.
Montana	Over the Flathead Reservation, limited to criminal and later, by tribal consent, to certain domestic relations issues.
Nevada	Over the Ely Indian Colony and any other reservation that may subsequently consent.
North Dakota	Limited to civil jurisdiction over any reservation that gives its consent. No tribe has consented.
South Dakota	A federal court invalidated the jurisdiction assumed by the state and therefore no Pub. L. No. 280 jurisdiction exists.[234]
Utah	All Indian country within the state with tribal consent. No tribe has consented.
Washington	All fee patent (deeded) land within Indian country. Jurisdiction on trust land is limited to the following subjects unless the tribe requests full jurisdiction: compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoptions, dependent children, operation of motor vehicles on public roads. The following tribes have requested and are now under full state jurisdiction: Chelhalis, Colville, Muckleshoot, Nisqually, Quileute, Skokomish, Squaxin, Swinomish and Tulalip.
	Retroceding States
Minnesota	Retroceded jurisdiction over the Nett Lake Reservation (1975).
Nebraska	Retroceded jurisdiction over the Omaha tribe except for traffic violations on public roads (1970).
Nevada	Retroceded jurisdiction over all but the Ely Indian Colony (1975).
Oregon	Retroceded jurisdiction over criminal matters on the Umatilla Reservation (1981).
Washington	Retroceded jurisdiction over the Quinault Reservation (1969), the Suquamish Port Madison Reservation (1972), and the Colville Reservation (1987).
Wisconsin	Retroceded jurisdiction over the Menominee Tribe.

B. Jurisdictional Issues in the Federal Highway Program

1. Highway Beautification Act of 1965[238]

In 1976 FHWA concluded that the states could not be penalized by a 10 percent reduction in federal-aid highway funds, 23 U.S.C. Section 131(b), for failure to enforce Section 131, *et seq.*, on federal Indian reservations.[239] Before reaching its conclusion, FHWA obtained a legal opinion from the solicitor of interior, which concluded that Indian reservation lands were subject to regulation under the act.[240] Based on this Department of Interior opinion and its own legal analysis, the FHWA legal opinion concluded:

> Although statutory construction leads us to the conclusion that Indian reservations are technically within the meaning of the phrase "reservations of the United States"...failure of the Act to delegate either to the [FHWA] or to the Department of the Interior, the explicit authority to implement the Act on Indian reservations results in nonapplicability to Indian reservations due to: a. Lack of uniform civil jurisdiction of the States over Indian reservations, thereby resulting in irregular exercise of the States' police power through their zoning ordinances; b. Lack of authority of the States to condemn Indian reservation land; and c. Lack of specific delegation by Congress to any Federal agency or department the necessary authority and jurisdiction to implement the Act on Indian reservations.

In California v. Naegele Outdoor Advertising Co.,[241] a 1985 decision of the Supreme Court of California, it was held that:

> (1) Department of Transportation could not, through Outdoor Advertising Act, regulate billboards erected on reservation land held in trust by United States; (2) state's regulatory authority in area of outdoor advertising on Indian reservation land was preempted by operation of Federal Highway Beautification Act.

2. Enforcement of 55 Miles per Hour Speed Limit[242]

FHWA dealt with state enforcement of the 55 miles per hour speed limit on Indian reservations in a 1975 memorandum.[243] The memorandum was prompted by enforcement problems in Montana, where the state could enforce (partly or fully) the speed limit on only three out of seven Indian reservations in the state. FHWA concluded:

> [T]hat on reservations where the Indians have refused consent to State assumption of jurisdiction, the State cannot be penalized under Section 154 for having a "speed limit...within its jurisdiction in excess of fifty-five," or under Section 141 for failing to certify...that it is enforcing...all speed limits on public highways in accordance with Section 154....

3. Application of the Federal Motor Carrier Safety Regulations and the Federal Hazardous Materials Regulations to Indian Tribes

A 1993 FHWA memorandum concluded that federal motor carrier safety regulations (FMCSRs) applied to Indian tribal entities, that federal hazardous materials regulations (FHMRs) applied to Native Americans living on tribal lands and involved in interstate commerce, that FHMRs apply when the "interstate transportation is conducted solely within the tribe's reservation," and that FMCSRs apply in the same manner in similar situations. It advised that:

> [T]he FMCSRs generally apply to the various Indian tribes as they do not interfere with purely intramural affairs of the tribe, and there is no evidence in the Congressional history of the act that Congress intended to exclude the Indian tribes from regulation under the act. Lastly, although it is doubtful that a treaty would exclude enforcement of the act, every treaty with each specific tribe MUST be consulted before a definite answer can be given. Treaties with specific Indian tribes may limit the ability of Federal agents entering Indian lands without the tribes' prior consent.

VII. CONCLUSION

This paper was intended to be a primer for highway officials and tribal officials to gain a better understanding of federal Indian law and federal highway law as it relates to Indian lands. Given that Indian law is very complex and ever changing, it constitutes a "moving target" for anyone trying to understand and apply it. This body of law, as it now stands, has many legal issues that are unresolved. However, the new emphasis and recognition being given to Indian tribal sovereignty by Congress and the Executive Branch make it clear that Indian self-determination is the federal policy. Conflicts in jurisdiction can be greatly reduced if Indian self-determination is accepted.

By the same token, highway law is very complex, both at the federal and state levels, and what may be authorized for one type of highway funding may be prohibited for similar funding on Indian lands. This means that highway officials and tribal officials must make adjustments in their government-to-government relations and begin to better emphasize consultation and coordination in a spirit of cooperation.

ENDNOTES

[1]F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 180–206 (1982), [hereinafter COHEN].

[2]*Id.* at 181–88. President Bush in a proclamation issued March 2, 1992, 57 Fed. Reg. 7873, proclaimed 1992 as the "Year of the American Indian," which affirmed "the right of Indian tribes to exist as sovereign entities...[and] express[ed] our support for tribal self-determination."

[3]59 Fed. Reg. 22951 (1994).

[4]COHEN, *supra* note 1, at 180.

[5]BUREAU OF INDIAN AFFAIRS, AMERICAN INDIANS TODAY 9–10 (1991) [hereinafter AMERICAN INDIANS TODAY].

[6]Other large reservations include San Carlos (1.8 million acres), Hopi (1.6 million acres), Tohono O'odham (1.2 million acres), and Fort Apache (1.7 million acres), all in Arizona; Wind River in Wyoming (1.9 million acres); Pine Ridge (1.8 million acres) and Cheyenne River (1.4 million), both in South Dakota; Crow (1.5 million acres) in Montana; and Yakima (1.1 million acres) in Washington.

[7]AMERICAN INDIANS TODAY, *supra* note 5, at 9.

[8]*See generally* COHEN, *supra* note 1, at 19–26; see also CLINTON ET AL., AMERICAN INDIAN LAW 883–87 (The Michie Co. 3d ed. 1991); and STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 12-14 (Southern Illinois University Press, 2d ed. 1992).

[9]Baca, 36 FLA. BAR J. 6, at 421.

[10]COHEN, *supra* note 1, at 19.

[11]AMERICAN INDIANS TODAY, *supra* note 5, at 13.

[12]See 25 U.S.C. § 479.

[13]Baca, *supra note* 9, at 421.

[14]*Id.*

[15]Generally see Weatherhead, *What Is an "Indian Tribe"—The Question of Tribal Existence*, 8 AM. INDIAN L. REV. 1 (1980); COHEN, *supra* note 1, at 3–4; AMERICAN INDIAN LAW DESKBOOK, at 28–34; CLINTON ET AL., *supra* note 8, at 79-83; PEVAR, *supra* note 8, at 14–15.

[16]AMERICAN INDIANS TODAY, *supra* note 5, at 13; *see also* Montoya v. United States, 180 U.S. 261, 266 (1901) where the Court said: "By a 'tribe' we understand a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."

[17]COHEN, *supra* note 1, at 3.

[18]DESKBOOK, *supra* note 15, at 32, n.19.

[19]AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 461 (Government Printing Office, 1977).

[20]AMERICAN INDIANS TODAY, *supra* note 5, at 9.

[21]See Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. LAW REV. 246 (1989); COHEN, *supra* note 1, at 27-46, CLINTON ET AL., *supra* note 8, at 39–41; DESKBOOK, at 14–15; PEVAR, *supra* note 8, at 16–19.

[22]COHEN, *supra* note 1, at 28.

[23]2 J. CONTINENTAL CONG. 175 (1775). See also U.S. CONST. art. 1, § 8, cl. 3, giving Congress "power to regulate commerce with the Indian tribes."

[24]Sept. 17, 1778, 7 Stat. 13

[25]Act of July 22, 1790, Ch. 33, 1 Stat. 137 (The Trade and Intercourse Act of 1790).

[26]CLINTON ET AL., *supra* note 8, citing as examples: Treaty with the Kansas, Oct. 5, 1859, 12 Stat. 1111; Treaty with the Winnebago, Apr. 15, 1859, 12 Stat. 1101; Treaty with the Menominee, May 12, 1854, 10 Stat. 1064, at 146.

[27]*Id.* at 147, citing the Act of Jan. 29, 1861, ch. 20, § 1, 12 Stat. 127, and Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 960–61 (1975).

[28]Eleven states initially disclaimed jurisdiction over Indian lands, including Indian reservation land, in their state constitutions at the time they received statehood. This disclaimer, however, is not to be interpreted as a total disclaimer of jurisdiction over the actions of Indians. These states are as follows:

1. Alaska: ALASKA CONST. art. 12, § 12; Enabling Act, 72 Stat. 339 § 4, as amended, 73 Stat. 141
2. Arizona: ARIZ. CONST. art 20; Enabling Act, 36 Stat. 568; § 19;
3. Idaho: IDAHO CONST. art 21, § 19; Enabling Act, 26 Stat. 215
4. Montana: MONT. CONST. ord. I, § 2; Enabling Act, 25 Stat. 676 §§ 4 and 10; Pres. Procl. 26 Stat. 1551
5. New Mexico: N.M. CONST. art 21, §§ 2 and 10; Enabling Act, 36 Stat. 557; Joint Res., 37 Stat. 39; Pres. Procl., 37 Stat. 1723
6. North Dakota: N.D. CONST. art. 16; Enabling Act, 25 Stat. 676 §§ 4 and 10; Pres. Procl., 26 Stat. 1548
7. Oklahoma: OKLA. CONST. art. I,. § 3; Enabling Act, 34 Stat. 267 §§ 1, 2, and 3; Pres. Procl., 35 Stat. 2160
8. South Dakota: S.D. CONST. art. 22, § 2; Enabling Act, 25 Stat. 676 §§ 4 and 10; Pres. Procl., 26 Stat. 1549
9. Utah: UTAH CONST. art. 3; Enabling Act, 28 Stat. 107 § 3; Pres. Procl., 29 Stat. 876
10. Washington: WASH. CONST. art. 26; Enabling Act, 25 Stat. 676; Pres. Procl., 26 Stat. 1552
11. Wyoming: WYO. CONST. art. 21, § 26; Enabling Act, 26 Stat. 222

[29]COHEN, *supra note 1, at 66.*

[30]DESKBOOK, *supra* note 15, at 45–46.

[31]COHEN, *supra* note 1, at 127–28.

[32]*See generally*, COHEN, *supra* note 1, at 487–92; CLINTON ET AL., *supra* note 8, at 679–95; DESKBOOK, *supra* note 15, at 39–46; PEVAR, *supra* note 8, at 19–22.

[33]The Appropriations Act of March 3, 1871, Ch. 120, § 1, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71). The federal government continued to deal with Indian tribes after 1871 by agreements, statutes, and executive orders that had legal ramifications similar to treaties. COHEN, *supra* note 1, at 127 (Ch. 2, Sec. C1.).

[34]COHEN, *supra* note 1, at 65, note 38.

[35]See generally, COHEN, *supra* note 1, at 220–21.

[36]30 U.S. (5 Pet.) 1 (1831).

[37]*Id.* at 17.

[38]COHEN, *supra* note 1, at 221.

[39]21 U.S. (8 Wheat) 543 (1823).

[40]*Id.* at 587–88.

[41]394 F.2d 8, 11. *Cf.* United States v. Thomas, 151 U.S. 577, 14 S.Ct. 426, 38 L.Ed. 276 (1894); Wisconsin v. Hitchcock, 201 U.S. 202, 26 S.Ct. 498, 50 L.Ed. 727 (1906).

[42]*E.g.*, Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935, 945 (Ct. Cl. 1974).

[43]Barker v. Harvey, 181 U.S. 481, 498–99 (1901).

[44]*Strong* v. United States, 518 F.2d 556, 560, 207 Ct. Cl. 254 *cert. denied*, 423 US1015 (1975); Sac and Fox Tribe v. United States, 315 F.2d 896, 903, 161 Ct. Cl. 189, *cert. denied*, 375 U.S. 921 (1963).

[45]*See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 288–89 (1955).

[46]Oneida Indian Nation v. County of Oneida, N.Y., 414 U.S. 661, 668–70 (1974).

[47]United States v. Bouchard, 464 F.Supp. 1316, 1347 (W.D. Wis. 1978); Bennett County v. United States, 394 F.2d 8, 11 (8th Cir. 1968).

[48]See United States v. Sioux Nation, 448 U.S. 371, 415 n.29 (1980); Minnesota Chippewa Tribe v. United States, 315 F.2d 906, 161 Ct. Cl. 258 (1963).

[49]Lac Courte Oreilles Band, etc. v. Voigt, 700 F.2d 341, 352 (7th Cir. 1983), citing Mattz v. Arnett, 412 U.S. 481, 505 (1973).

[50]225 U.S. 551 (1912).

[51]*Id.* at 555–56.

[52]*See generally, Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess. 428-89 (1934) (History of the Allotment Policy), reprinted as D. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (F. Prucha ed., University of Oklahoma Press, 1973) [hereinafter D. OTIS].

[53]See Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 650 n.1, 96 S.Ct. 1793, 1794, n.1, 48 L.Ed.2d 274 (1976), *cited in* Southern California Edison Company v. Rice, 685 F.2d 354, 356 (9th Cir. 1982).

[54]President Roosevelt described the allotment process in his message to Congress in 1906 as "a mighty pulverizing engine to break up the tribal mass." 35 CONG. REC. 90 (1906).

[55]In 1934 Congress enacted the Indian Reorganization Act, Ch. 576, 48 Stat. 984 (June 18, 1934) (codified as amended 25 U.S.C. 461–79 (1982)).

[56]D. OTIS, *supra* note 52, at 87.

[57]DESKBOOK, *supra* note 15, at 19.

[58]48 Stat. 984.

[59]AMERICAN INDIANS TODAY, *supra* note 5, at 9.

[60]Bennett County v. U.S., 394 F.2d 8, 11(8th Cir. 1968). *Cf.* Missouri-Kansas-Texas Railway Co. v. United States, 235 U.S. 37, 35 S.Ct. 6, 59 L.Ed. 116 (1914); Nor. Pac. Ry. Co. v. United States, 227 U.S. 355, 33 S.Ct 368, 57 L.Ed. 544 (1913); Putnam v. United States, 248 F.2d 292 (8th Cir. 1957).

[61]*Id. Cf.* United States ex rel Hualpia Indians v. Santa Fe Pacific R. Co., 314 U.S. 339, 62 S.Ct. 248, 86 L.Ed. 260, *reh'g denied*, 314 U.S. 716, 62 S.Ct. 476, 86 L.Ed. 570 (1941).

[62]Bennett Co., 394 F.2d at 11 and 12. See United States v. Santa Fe Pacific R. Co., *supra* note 6; Nor. Pac. Ry. Co. v. United States, *supra* note 60; Leavenworth, etc. R.R. Co. v. United States, 92 U.S. 733, 23 L.Ed. 634 (1875); United States v. Shoshone Tribe, 304 U.S. 111, 58 S.Ct. 794, 82 L.Ed. 1213 (1938).

[63]Ch. 832, § 4, 31 Stat. 1058, 1084 (codified at 25 U.S.C. § 311), which provides: "The Secretary of the Interior is authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indian under any laws or treaties but which have not been conveyed to the allottee with full power of alienation."

[64]See, e.g., 25 U.S.C. §§ 311 (opening of highways), 312 (rights of way for railway, telegraph, and telephone lines), 319 (rights of way for telephone and telegraph lines), 320 (acquisition of lands for reservoirs or materials), 321 (rights of way for pipe lines); 43 U.S.C. §§ 959 (rights of way for electrical plants), 961 (rights of way for power and communications facilities).

[65]25 C.F.R. § 169.28 also provides as follows in subparagraph (b): "In lieu of making application under the regulations in this part 169, the appropriate State or local authorities in Nebraska or Montana may, upon compliance with the requirements of the Act of March 4, 1915 (38 Stat. 1188), lay out and open public highways in accordance with the respective laws of those States...."

[66]Act of Feb. 5, 1948, ch. 45, 62 Stat. 17 (codified at 25 U.S.C. §§ 323–28).

[67]Nebraska Public Power District v. 100.95 Acres of Land, 719 F.2d 956, 958 (8th Cir. 1983). For example, the court noted that frequently, "many individual Indians, often widely scattered, owned undivided interests in a single tract of land. Obtaining the signatures of all the owners was a time-consuming and burdensome process, both for the party seeking the right-of-way and for the Interior Department."

[68]25 U.S.C. § 326.

[69]25 U.S.C. § 324. Consent is also required for tribes organized under the Oklahoma Indian Welfare Act, 25 U.S.C. §§ 501–509, and for Alaska Native villages organized under the Indian Reorganization Act. 25 U.S.C. §§ 461–79.

[70]25 C.F.R. § 169.3(a).

[71]25 U.S.C. § 324; 25 C.F.R. § 169.3(c) (1993). The secretary may issue permission to survey with respect to, and he may grant rights of way over and across individually owned lands without the consent of the individual Indian owners when: (1) the individual owner is a minor or *non compos mentis*, and such grant will cause no substantial injury to the land or owner that cannot be adequately compensated for by monetary damages; (2) the land is owned by more than one person, and the owners or owner of a majority of the interests consent to the grant; (3) the whereabouts of the owners or owner of the land are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (4) the heirs or devisees of a deceased owner of the land have not been determined and the grant will cause no substantial injury to the land or owner thereof; (5) the owners of interests in the land are so numerous that the secretary finds it would be impracticable to obtain their consent and also finds that the grant will cause no substantial injury to the land or any owner thereof. 25 C.F.R. § 169.3(a) (1993).

[72]237 Wis. 310, 296 N.W. 645 (Sup. Ct. Wis. 1941).

[73]*Id.*, 296 N.W. 645–46.

[74]Application of Konaha, Konaha v. Brown, 131 F.2d 737, (7th Cir. 1942).

[75]*Id.* at 738.

[76]*Id.* at 739.

[77]*Id.*

[78]65 F.Supp 4 (D. Wis. 1946).

[79]*Id.* at 5, 6.

[80]320 P.2d 697 (1958).

[81]*Id.* at 700. *Accord:* Enriquez v. Superior Court, 115 Ariz. 342, 565 P.2d 522 (Ct. App. Ariz. 1977), (involving tort suit brought by non-Indians against Papago Indians residing on the reservation, for injuries resulting from a motor vehicle accident occurring on state highway within the reservation), *held*: no state court jurisdiction—"Their right of self-government includes the right to decide what conduct on the reservation will subject the Indians living there to civil liability in the Tribal court." See also State of Wyoming ex rel. Peterson v. District Court and Milbank Mutual Insurance Co., 617 P.2d 1056 (Sup. Ct. Wyo. 1980) (held that tribal court, not state court, had jurisdiction of suit for damages arising out of collision between horse and pickup, both owned by tribal members, occurring on Indian reservation); Gourneau v. Smith, 207 N.W.2d 256 (Sup. Ct. N.D. 1973), (held that state court did not have jurisdiction of tort action by one Indian against another Indian for injuries resulting from automobile accident on state highway within limits of Indian reservation where Indians had not voted to accept state jurisdiction); *Accord*: Schantz v. White

Lightning, 231 N.W.2d 812 (Sup. Ct. N.D. 1975) (tort action by non-Indian against Indian).

[82]320 P.2d 1017 (1958).

[83]*Id.* at 320 P.2d 1019–20.

[84]State v. Webster, 114 Wis.2d 418, 338 N.W.2d 474 (1983).

[85]*Id.*, 338 N.W.2d at 480. The court cited United States v. Harvey, 701 F.2d 800, 805 (9th Cir. 1983), *cert. denied*, 494 U.S. 1082, (25 U.S.C. sec. 311 is not a general grant of jurisdiction to the states over the land constituting the right of way); Ortiz-Barraza v. United States, 512 F.2d 1176, 1180 (9th Cir. 1975) (rights of way running through a reservation remain part of the reservation and within the territorial jurisdiction of tribal police).

[86]318 U.S. 206 (1943).

[87]434 F.Supp. 625, (D. Ct. Mont. 1977), at 629. *Accord:* United States v. Gates of the Mountains Lakeshore Homes, 565 F.Supp. 788, 794 (D. Montana, 1983). See also State of Wyoming *ex rel.* Alice Peterson v. District Court of Ninth Jud. Dist., 617 P.2d 1056, 1076.

[88]Subsection (a) of § 317 provides that the Secretary of Transportation "shall file with the Secretary of the Department supervising the administration of such lands or interests in lands a map showing the portion of such lands or interests in lands it is desired to appropriate." Subsection (b) provides that the lands may be appropriated for highway purposes if within four months after the filing of the map by the Secretary of Transportation, the Secretary of the Department having jurisdiction over the lands either (1) does not certify that appropriation would be "contrary to the public interest or inconsistent with the purposes for which such land (has) been reserved," or (2) does agree to the appropriation under such conditions as "he deems necessary for the adequate protection and utilization of the reserve." 23 U.S.C. § 317.

[89]425 F.2d 317 (9th Cir. 1970).

[90]*Id.* at 318.

[91]*Id.* at 319–20 and n.8. PPM 80-8 provided that applications for rights of way across Indian lands "*shall* be filed with the Department of Interior in accordance with the regulations established by the Bureau of Indian Affairs for the processing of applications under 25 U.S.C. 325-328," referring to 25 C.F.R. 161, which is now 25 C.F.R. 169. PPM 80-8 is now codified at 23 C.F.R. 712, Subpart E. § 712.503, paragraph (b) of the regulation provides: "If lands or interests in lands owned by the United States are needed for highway purposes, the SHD shall...file applications with FHWA *except* that if such lands are managed or controlled by...Bureau of Indian Affairs, the SHD *may* make applications directly to said agenc[y]." (emphasis added).

[92]§ 712.503 makes reference to Appendix 1 which provides for the direct filing of right-of-way applications to BIA: "(a)...Application should be submitted directly to the Bureau of Indian Affairs, Washington, DC, for rights-of-way across tribal lands or individually owned lands held in trust by the United States or encumbered by Federal restrictions. All other lands held by the Bureau of Indian Affairs are transferred under 23 U.S.C. 107(d) and 317."

[93]United States v. Klamath and Moadoc Tribes, 304 U.S. 119, 123, 58 S.Ct. 799, 82 L.Ed. 1219 (1938).

[94]25 U.S.C. 325; 25 C.F.R. § 169.12.

[95]Appropriations Act of Mar. 3, 1901, ch. 832 § 3, 31 Stat. 1058, 1084 (codified at 25 U.S.C. § 357).

[96]305 U.S. 382 (1939).

[97]*Id.* at 386.

[98]*Id.* at 389. In *Nicodemus v. Washington Power Company*, 264 F.2d 614 (9th Cir. 1959), the court cited *Minnesota v. United States*, in holding: "The United States is an indispensable party to a suit to establish or acquire an interest in allotted Indian land held under a trust patent, and such a suit must be instituted and maintained in the federal court." at 615. *Accord:* Southern California Edison Co. v. Rice, 685 F.2d 354 (9th Cir. 1982), at 357.

[99]See Nicodemus v. Washington Water Power Co., *Id.*; Southern California Edison Co. v. Rice, *Id.*; Yellowfish v. City of Stillwater, 691 F.2d 926 (10th Cir.1982), *cert. denied*, 461 U.S. 927 (1983); Nebraska Public Power District v. 100.95 Acres of Land, 719 F.2d 956 (8th Cir. 1983).

[100]United States v. 10.69 Acres of Land, 425 F.2d 317 (9th Cir. 1970); Nebraska Public Power District v. 100.95 Acres of Land, *supra* note 99.

[101]445 U.S. 253 (1980).

[102]*Id.* at 254, 259.

[103]The topic of tribal sovereignty dominates law review articles, comments, and notes. See generally, the following: Royster, *Fresh Pursuit onto Native American Reservations: State Rights "To Pursue Savage Hostile Indian Marauders across the Boarder": An Analysis of the Limits of State Intrusion into Tribal Sovereignty*, 59 U. COLO. L. REV. 191 (1988); Furber, *Two Promises, Two Propositions: The Wheeler-Howard Act as a Reconciliation of the Indian Law Civil War*, 14 U. PUGET SOUND L. REV. 211 (1991).

[104]31 U.S. (6 Peters) 515 (1832).

[105]Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

[106]Worcester, *supra* note 104, at 559, 561. In *Wheeler v. United States*, 435 U.S. 313, (1978), at 323, the Court said: "...until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a result of their dependent status." Thus, tribes retain inherent powers of self-government over tribal members. In *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 at 333 (1983), the Court reaffirmed the inherent right to determine who can enter a reservation, unanimously ruling that "[a] tribe's power to exclude nonmembers entirely or to condition their presence on the reservation is equally well established [citations omitted]."

[107]PEVAR, *supra* note 8, at 79-110.

[108]*Williams v. Lee*, 358 U.S. 217 (1959), where the Court enunciated the infringement doctrine and held that the state court lacked jurisdiction to hear a contract dispute arising between an Indian and a non-Indian on the Navajo Reservation. The Court reviewed the doctrine of *Worcester*, noting that it stood for the proposition that "absent governing acts of Congress, the question has always been whether the state action infringed on the rights of reservation Indians to make their own laws and be ruled by them." at 220.

[109]McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973); Warren Trading Post v. Arizona State Tax Commission, 380 U.S. 685 (1965). In 1980 the Court set out the modern preemption principles in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), where a state motor carrier license tax on a non-Indian contractor was overturned. See also *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) at 338, where the Court denied New Mexico concurrent jurisdiction of non-Indian fishermen and hunters on the reservation on the basis of federal preemption.

[110]In Oliphant v. Suquamish Indian Tribe, *supra* note 105, (*habeas corpus* petitions granted to two non-Indians for misdemeanor crimes occurring on the reservation, one involving reckless driving, held tribal inherent power significantly reduced as to non-Indians); Wheeler v. United States, *supra* note 106, (federal prosecution of Navajo tribal member for conduct

previously punished under tribal law held not to be double jeopardy since tribes retained sovereignty over internal tribal relations); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), (equal protection challenge by female member and her daughter to tribal ordinance extending membership to children of male members marrying outside tribe, but not to children of female members. In rejecting the challenge, the Court noted that "[a]lthough no longer 'possessed of the full attributes of sovereignty,'" tribes do "have the power to make their own substantive laws in internal matters and to enforce that law in their own forums...," at 55–56).

[111]447 U.S. 134 (1980).

[112]*Id.* at 152. See also Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), (severance tax on oil and natural gas upheld by the Court, which noted that "[t]he power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management" and the power to tax "derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction." at 131; *Accord*: Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985), upholding two ordinances imposing taxes known as the Possessory Interest Tax and the Business Activity Tax.

[113]450 U.S. 544 (1981).

[114]*Id.* at 565–66. The Court later held in *Merrion v. Jicarilla Apache Tribe*, *supra* note 112, that tribes retain civil-regulatory authority over nonmembers entering tribal property, including the power to exclude nonmembers and the lesser power to place conditions on their entrance and continued presence.

[115]492 U.S. 408 (1989). *See generally*, Clayton, *Brendale v. Yakima Nation: A Divided Supreme Court Cannot Agree over Who May Zone Nonmember Fee Lands Within the Reservation*, 36 S.D. L. REV. 329 (1991).

[116]450 U.S. 544, at 565.

[117]DESKBOOK, *supra* note 15, at 109–110.

[118]495 U.S. 676 (1990). See generally, Fabish, *The Decline of Tribal Sovereignty: The Journey from Dicta to Dogma in Duro v. Reina*, 66 WASH. L. REV. 567 (1991).

[119]Pub. L. No. 102-240 (Dec. 18, 1991).

[120]*Id.*, Section 1005, amending 23 U.S.C. 101: "The term 'public authority' means a Federal, State, county, town, or township, Indian tribe, municipal or other local government or instrumentality with authority to finance, build, operate, or maintain toll or toll-free facilities."

[121]*Id.*, Sec. 1025(a), amending 23 U.S.C. 135.

[122]58 Fed. Reg. 58040 (Oct. 28, 1993).

[123]*See generally*, DESKBOOK, *supra* note 15, Chap. 10, Environmental Regulation, at 263–300.

[124]Pub. L. No. 91-190, Jan. 1, 1970, 83 Stat. 852, 42 U.S.C. §§ 4321, *et seq.*

[125]COHEN, *supra* note 1, at 282.

[126]*Id.*

[127]*Id.* at 283.

[128]*See generally*, Gover and Walker, *Tribal Environmental Regulation*, 39 FED. B. NEWS J. 438 (No. 9, 1989); DESKBOOK, *supra* note 15, Chap. 10, at 263–300.

[129]State of Washington Department of Ecology v. United States Environmental Protection Agency, 752 F.2d 1465 (9th Cir. 1985), which addressed the issue of whether the Resource Conservation and Recovery Act authorizes state authority over tribal lands.

[130]McClanahan v. Arizona State Tax Comm'n, *supra* note 109, at 170, 171.

[131]California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), at 214–15.

[132]462 U.S. 324, at 331–32 (1983).

[133]447 U.S. 134, at 155.

[134]40 C.F.R. § 1508.18(a).

[135]469 F.2d 593 (10th Cir. 1972).

[136]*Id.* at 597–98. *See also* National Helium Corporation v. Morton, 455 F.2d 650 (10th Cir. 1971).

[137]40 C.F.R. pt. 1500, §§ 1501.5, 1501.6 NEPA.

[138]*E.g.*, memorandum of understanding among the FHWA, Montana Department of Highways, and the Confederated Salish and Kootenai Tribes of the Flathead Nation, dated May 29, 1991, covering improvements to U.S. 93.

[139]DESKBOOK, *supra* note 15, Chap. 14.

[140]*See* 23 C.F.R. § 109(a)(1) (1993): "The provisions of this regulation and the CEQ regulations apply to actions where the Administration exercises sufficient control to condition the permit or project approval. Actions taken by the applicant which do not require Federal approvals, such as preparation of a regional transportation plan are not subject to this regulation."

[141]*See* e.g., Atlanta Coalition on Transportation Crisis, Inc. v. Atlanta Regional Commission, 599 F.2d 1333 (5th Cir., 1979).

[142]752 F.2d 1465 (9th Cir. 1985) at 1470.

[143]645 F.2d 701 (9th Cir. 1981).

[144]Pub. L. No. 95-341; (Aug. 11, 1978), 92 Stat. 469, 42 U.S.C. 1996.

[145]Wilson v. Block, 708 F.2d 735, 747 (D.C. Cir. 1983).

[146]S 1021, 103d Cong. 1st Sess.

[147]Pub. L. No. 96-95, (Oct. 31, 1979), 93 Stat. 721, 16 U.S.C. 470aa.

[148]Pub. L. No. 89-665, (Oct. 15, 1966), 80 Stat. 915, 16 U.S.C. 470, amended in 1980 & 1992. Pub. L. No. 102-575 (Oct. 30, 1992), *et seq.*

[149]Pub. L. No. 89-670, revised and recodified by Pub. L. No. 97-499, Jan. 12, 1983, 96 Stat. 2419, and amended by Pub. L. No. 100-17, Title I, § 133(d), Apr. 2, 1987, 101 Stat. 173, 49 U.S.C. 303 (1994).

[150]Act of June 30, 1834, § 9, 4 Stat. 737, 25 U.S.C. § 45: "In all cases of the appointments of interpreters or other persons employed for the benefit of the Indians, a preference shall be given to a person of Indian descent...."

[151]See Morton v. Mancari, 417 U.S. 535, 541, note 8 (1974).

[152]Act of June 18, 1934, § 12, 48 Stat. 986, 24 U.S.C. § 472.

[153]42 U.S.C. §§ 2000e(b) and 2000e-2(i). Section 701(b) excludes "an Indian Tribe" from the act's definition of "employer." Section 703(i) provides: "Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation."

[154]41 C.F.R. § 60-1.5(a)(6).

[155]*Id.* "Contractors or subcontractors extending such a preference shall not, however, discriminate among Indians on the basis of religion, sex, or *Tribal affiliation....*" (emphasis added)

[156]Pub. L. No. 92-96, 86 Stat. 103 (Mar. 24, 1972), 42 U.S.C. § 2000e, *et seq.*

[157]417 U.S. 535, at 553–55.

[158]*Id.*, n.24 at 554.

[159]Pub. L. No. 60-104 (Apr. 30, 1908), ch. 153; 35 Stat. 71, 25 U.S.C. § 47.

[160]Andrus v. Glover Construction, 446 U.S. 608 (1979).

[161]Pub. L. No. 93-638, (Jan. 7, 1975), 88 Stat. 2205, 25 U.S.C. § 450e, *et seq.*

[162]25 U.S.C. § 450f(a).

[163]See St. Paul Intertribal Housing Board v. Reynolds, 564 F.Supp. 1408

(D.Minn., 1983), upholding Housing and Urban Development (HUD) program giving contracting preference to Indian-owned businesses in HUD-financed Indian housing programs.

[164]Pub. L. No. 97-424, (Jan. 6, 1983); Act of Jan. 6, 1983, 96 Stat. 2097.

[165]23 U.S.C. 101. "The term 'Indian reservation roads' means public roads, that are located within or provide access to an Indian reservation or Indian trust land or restricted Indian land which is not subject to fee title alienation without the approval of the Federal Government, or Indian and Alaska Native villages, groups, or communities in which Indians and Alaskan Natives reside, whom the Secretary of the Interior has determined are eligible for services generally available to Indians under Federal laws specifically applicable to Indians."

[166]Section 8(a) of the Small Business Act Pub. L. No. 85-536 (July 1958), 72 Stat. 309, as amended: 15 *U.S.C. 636 (a)*.

[167]48 C.F.R. 52.226-1 (1993).

[168]Pub. L. No. 100-117 § 122 (Apr. 2, 1987), 101 Stat. 160.

[169]Unpublished internal memorandum of Feb. 1, 1985, from the federal highway administrator to federal highway administrators.

[170]Unpublished memorandum dated Mar. 5, 1985, from FHWA associate administrator for engineering to FHWA Region 8 administrator.

[171]Act of Dec. 18, 1991, 105 Stat. 1914, § 1026. This section also amended *23 U.S.C. § 140*, to fund highway construction training for Indians.

[172]H.R. No. 171, Part 1, 102nd Congress, 1st Sess., p. 83, which stated: "Subsection (b) amends section 140(d) to authorize states to extend Indian employment preference programs to projects near reservations. Currently, such programs are limited to Indians living on or near reservations and to projects on Indian reservation roads."

[173]Unpublished memorandum dated Nov. 13, 1992, from FHWA Region 8 counsel to FHWA Montana division administrator.

[174]The position taken by FHWA in the Nov. 13, 1992, memorandum was confirmed in a June 16, 1993, letter from federal highway administrator to the Blackfeet tribal business council.

[175]TERO, Council for Tribal Employment Rights (Seattle, Wash., Spring 1987).

[176]*E.g.*, the State of Wyoming, while giving notice in the bid invitation of the Wind River Reservation TERO requirements, let the winning contractor handle any negotiations with the tribes relative to hiring preferences. A Mar. 9, 1988, unpublished opinion of the U.S. District Court, District of Wyoming, in *Dry Creek Grading, Inc. v. U.S. Dept. of Energy, State of Wyoming, et al*, (No. C87-0273J), found that the TERO expressly excluded federal and state agencies, their contractors, and subcontractors from its requirements.

[177]The Crow Tribe of Montana enacted a TERO in 1979 and insisted on Indian hiring preference, *inter alia*, as a condition to their consenting to the transfer of tribal lands for right of way for construction of I-90. An agreement between the state and the Crow Tribe, dated Apr. 4, 1983, provided that the following language would be included in all bid solicitations involving I-90 projects on the reservation:

> This project is located on the Crow Indian Reservation. Past efforts and projects in this area have developed a reservoir of capable trained workers. The contractor shall contact the Crow Tribal Chairman or his designee...for assistance in hiring such workers. **The contractor and all of its agents, subcontractors and assigns shall give preference to qualified Crows and other Indians in employment arising in connection with these projects.**

[178]*Supra* n.169.

[179]See S. Rep. 100-4, 100th Cong., 1st Sess., p. 18 (1987), U.S. CODE CONG. & ADMIN. NEWS, 1987, vol. 2, Logis. Hist., at 82.

[180]See 49 C.F.R. pt. 23 (1993).

[181]Unpublished memorandum dated Feb. 11, 1988, from FHWA deputy administrator to Region 10 regional administrator.

[182]Unpublished memorandum dated Apr. 15, 1993, from FHWA director, Office of Engineering, to FHWA Region 9 administrator.

[183]See *Altheimer & Gray v. Sioux Mfg. Corp* (N.D.Ill. 1992), 1992 WL 46479, where it was held that plaintiff could not pursue a breach of contract action against the tribal corporation without first obtaining the Department of Interior approval of the contract.

[184]905 F.2d 1311, (9th Cir. 1990).

[185]U.S. Dist. Ct., Montana, Case No. CV-86-5-BLG-JFB.

[186]*See supra* note 177.

[187]905 F.2d 1311

[188]450 U.S. 544 (1981).

[189]471 U.S. at 856–57.

[190]905 F.2d 1314, citing Montana, 450 U.S. at 565–66.

[191]Cardin de la Cruz 671 F.2d 363 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982).

[192]905 F.2d at 1315.

[193]Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987).

[194]Worcester, *supra* note 104; New Mexico v. Mescalero Apache Tribe, *supra* note 106; citing Montana v. United States, *supra* note 190; and Merrion v. Jicarilla Apache Tribe, *supra* note 112.

[195]Oliphant v. Suquamish Indian Tribe, *supra* note 105 (1978); Duro v. Reina, *supra* note 118 (1990). Subsequent to the *Oliphant* decision, a non-Indian committing a crime against an Indian on the reservation has to be tried in federal court, unless a federal statute has granted the state jurisdiction over crimes committed on the reservation.

[196]Grady v. Corbin 495 U.S. 508 (1989). Subsequent to this decision, Congress amended the Indian Civil Rights Act overruling the Supreme Court in Duro and retroactively reinstating the criminal jurisdiction of Indian tribes over nonmember Indians. The amendments had full retroactive effect. Mousseaux v. U.S. Com'r of Indian Affairs, No. 91-3005, (D. S.D., filed Oct. 27, 1992), WL 337421.

[197]CLINTON ET AL., *supra* note 8, n.2, at 328.

[198]See FABISH, *supra* note 118, for a discussion of tribal sovereignty over nonmember tribal Indians based on implied consent.

[199]Washington v. Confederated Tribes of the Colville Indian Reservation, *supra* note 133.

[200]Williams v. Lee, 358 U.S. 217 (1959).

[201]*Id.* at 233. In *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida*, (11th Cir. 1993), 999 F.2d 503, Circuit Judge Hatchett held that a district court did not have subject matter jurisdiction in a contract dispute between Indians and non-Indian plaintiffs; also, in *Gaines v. Ski Apache* (10th Cir. 1993), 8 F.3d 726, it was held that a federal district court did not have jurisdiction over an action arising from an accident at a ski resort owned and operated by the Mescalero Apache Tribe; however, see *Stock West Corp. v. Taylor*, (9th Cir. 1991), 942 F.2d 655, it was held that in an action for legal malpractice and misrepresentation arising from a dispute between an off-reservation contractor and a tribal attorney, deference to tribal court jurisdiction was not required and the federal district court could exercise concurrent jurisdiction.

[202]National Farmer's Union v. Crow Tribe, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed. 2d 818 (1985).

[203]For example, *see* FMC v. Shoshone-Bannock Tribes, *supra* note 184, where the tribes sued to enforce the TERO and to collect the TERO tax. *See also*, Taylor, *Modern Practice in The Indian Courts*, 10 U. PUGET SOUND L. REV. 231 (1987).

[204]§ 15-1-206, Rosebud Sioux Tribe Business Code.

[205]Farmers Union, 471 U.S. at 856-57. In *State ex rel. Joseph v. Redwing*, 429 N.W. 2d 49 (S.D. 1988), the South Dakota Supreme Court held that a state circuit court properly exercised subject matter jurisdiction over a controversy involving an Indian child and her Indian parents even though the dispute had previously been resolved in tribal court. See Walz, *State Ex Rel Joseph v. Redwing: A Dictionary Definition Rationale for the Infringement of Tribal Self-Government*, 34 S.D. L. REV. 701 (1989), on full faith and credit and comity issues involving tribal court decisions.

[206]*See Hess v. Pawloski*, 274 U.S. 352 (1927), for Supreme Court's sustaining of "implied consent" law.

[207]Application of Denet-Claw, *supra* note 80; New Mexico v. Begay, *supra* note 82; State v. Webster, *supra* note 84.

[208]In re Fredenberg, *supra* note 78.

[209]512 F.2d 1176 (9th Cir. 1975).

[210]*Supra* note 74.

[211]The decision in *Konaha* is cited in *Swift Transportation v. John*, 546 F.Supp. 1185 (D.Ariz. 1982),(suit by non-Indians seeking declaratory judgment that the tribal court lacked jurisdiction over them arising from a vehicle accident with Indians occurring on U.S. Highway 89 on the reservation.) *Held*: No jurisdiction in tribal court over U.S. 89 because Indian title extinguished under right-of-way grant pursuant to 25 U.S.C. § 325. However, under mandate from the Ninth Circuit Court, the decision was vacated. 574 F.Supp 710 (1983).

[212]463 U.S. 713 (1983).

[213]*Id.* at 718.

[214]361 N.W. 2d 699 (Wis. 1985).

[215]*Id.* at 702.

[216]*Id.*

[217]*Id.* at 702–703.

[218]938 F.2d 146 (9th Cir. 1991), *cert. denied*, 118 L. Ed. 2d 412, 112 S. Ct. 1704 (1992). *Compare*: State of Washington v. Schmuck, 121 Wn.2d 373, 850 P.2d 1332 (1992), involving the conviction of a non-Indian for driving under the influence of intoxicating liquor; *held*: state statute asserting criminal and civil jurisdiction over operation of motor vehicles did not divest Indian tribe of its inherent authority to stop and detain non-Indian for violation of state and tribal law while traveling on public road in reservation, until he could be turned over to state authorities for charging and prosecution.

[219]*Id.* at 149.

[220]DESKBOOK, *supra* note 15, at 391–92.

[221]*See generally*: COHEN, *supra* note 1, at 175–77, 362–72; DESKBOOK, *supra* note 15, at 93–96, 143–47; PEVAR, *supra* note 8, at 113–18.

[222]COHEN, *supra* note 1, at 152–77.

[223]H.R. CON. RES. 108, Aug. 1, 1953, 67 Stat. B132.

[224]Wilkinson & Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 151 (1977).

[225]PEVAR, *supra* note 8, at 118.

[226]Pub. L. No. 83-280, ch. 505, (Aug. 15, 1953), 67 Stat. 588, amending ch. 53 of 18 U.S.C. to add § 1162 and ch. 85 of 28 U.S.C. to add § 1360.

[227]PEVAR, *supra* note 8, at 113.

[228]Pub. L. No. 85-615, (Aug. 8, 1958), 72 Stat. 545.

[229]Pub. L. No. 83-280, §§ 6, 7.

[230]See 25 U.S.C. §§ 1321–26.

[231]PEVAR, *supra* note 8, at 117.

[232]*Id.* at 114.

[233]*Id.* at 116–17.

[234]Rosebud Sioux Tribe v. South Dakota, 900 F.2d 1164 (8th Cir. 1990, *cert. denied*, 59 L.W. 3767 (1991). For an analysis of this case see Cable, *Rosebud v. South Dakota: How Does Tribal Sovereignty Affect the Determination of State Jurisdiction on Reservation Highways?* 36 S.D. L. REV. 400 (1991).

[235]PEVAR, *supra* note 8, at 119.

[236]*Id.* at 260 and n.49, citing 25 U.S.C. § 232 (federal crimes are excepted).

[237]*Id.* at 258–59.

[238]Pub. L. No. 89-285, (Oct. 22, 1965) 79 Stat. 1028.

[239]Unpublished memorandum dated Jan. 23, 1976, from FHWA assistant chief counsel, to FHWA associate administrator for right of way.

[240]Unpublished memorandum dated Apr. 7, 1967, from associate solicitor, Indian affairs, to commissioner of Indian affairs.

[241]People Ex Rel Dept. of Transp. v. Naegele (1985), 38 Cal.3d 509, 698 P.2d 150.

[242]*See* 23 U.S.C. §§ 141, 154.

[243]Unpublished memorandum dated Sept. 30, 1975, from FHWA assistant chief counsel to FHWA Region 8 administrator.

ACKNOWLEDGMENTS

This legal study was performed under the overall guidance of NCHRP Project Committee SP20-6. The Committee is chaired by Delbert W. Johnson, Office of the Attorney General of Washington. Members are: Watson C. Arnold, Austin, Texas (formerly with Texas Office of the Attorney General); Robert F. Carlson, Carmichael, California (formerly with California Department of Transportation); Kingsley T. Hoegstedt, Carmel, California; Michael E. Libonati, Temple University School of Law; Spencer A. Manthorpe, Pennsylvania Department of Transportation; Walter A. McFarlane, Office of the Governor, Commonwealth of Virginia; Joseph M. Montano, Denver, Colorado (formerly with Colorado Department of Highways); Marilyn Newman, Boston, Massachusetts; Lynn B. Obernyer, Colorado Department of Law; Jean G. Rogers, Federal Highway Administration; James S. Thiel, Wisconsin Department of Transportation; and Richard L. Tiemeyer, Missouri Highway and Transportation Commission. Edward V.A. Kussy provides liaison with the Federal Highway Administration, and Crawford F. Jencks represents the NCHRP staff.