Retrieving "Lost" Sovereignty: Trespass Actions in Indian Country

by Thomas H. Nelson

Recently the Department of the Interior adopted regulations implementing 1993 federal legislation that authorized Indian tribes to bring enforcement actions against trespassers in Indian Country. These regulations not only clarify that such actions are not subject to federal control, they – along with two very significant and longstanding procedural protections afforded to Indians in Indian Country – create strong incentives for tribes and individual Indians to discover and prosecute claims for trespass on Indian lands. This article provides the legal background necessary for undertaking such an effort. More specifically, this article suggests that Indian tribes and allottees conduct an extensive and exhaustive review of occupants and occupiers of lands on the reservation for the purpose of determining the scope of existing trespasses. The review would include both documentary analysis and on-site inspections. A review of the placement of utility facilities on the reservation appears to be a very promising area of investigation. Once it is determined that trespasses are in fact occurring, appropriate enforcement action (including claims for damages) should be considered.

I. **Background: Land Ownership in Indian Country**[1]

The Euro-Americans' westward expansion in the second half of the 19th century resulted in increasing contacts with the aboriginal population. The Euro-Americans realized that the aboriginals' lands were highly desirable but that the aboriginals would defend their lands vigorously. In order to avoid broader conflict, the United States sought pacification by offering treaties that reserved to the Indians a tract of land that would be theirs exclusively into perpetuity: The United States would hold that land in trust for the Indians, and the Indians would not be allowed to transfer it to non-Indians. In this manner, it was thought, the aboriginal way of life could be preserved, and on the reserved lands the Indians would be able to continue their historic, sacred lifestyle.

Once the Indians were relocated to the reservations, the United States broke its promise that Indians have exclusive occupancy on the reservations. Some objected to the "dependent" status created by the treaties, feeling that Indians should be encouraged if not coerced into accepting the "civilized" ways of the Euro-Americans; consequently, there was a movement that favored ending the Indians' dependent status by terminating the reservations and forcing Indians into the American mainstream.[2] The first step to accomplish this transformation was the enactment of the General Allotment Act of 1887,[3] which authorized the transfer of collective tribal trust reservation land to individual Indian allottees who, after a specified period, would be able to convey the land in fee to anyone, including non-Indians. This legislation also authorized the United States, with the consent of the tribe, to sell "unallotted" land (also referred to as "surplus" land) to Euro-American homesteaders, thereby breaching the promise that reservations lands would be reserved for the Indians' exclusive use.[4] In 1904, Congress began to declare without tribal involvement that "surplus" reservation lands were available for homesteaders, with the payment therefore to be held for the tribes' benefit.[5] "These statutes allowed Euro-Americans to move onto and take over vast tracts of the arable portions of the western reservations; as a result, ownership of a large fraction of the most desirable land on reservations passed into non-Indian hands, and today ownership maps of reservations resemble "Public Act 58-3" a crazy quilt of land ownership, often with non-Indians vastly outnumbering the Indian population. With these legal developments, the term "reservation" became anomalous; the sacred lands were no longer "reserved" for Indians. The scope of Indian sovereignty on reservations fell further and further away from the promises in the treaties.

In 1934 the attempt to force Indians into the American mainstream was abandoned, and since then the federal government has ceased actively undermining the reservation system. However, the erosion of Indian control over Indian lands that occurred following the passage of the General Allotment Act could not be reversed, for major portions of Indian Country had devolved into Euro-American hands; today non-Indian residents on reservations object to tribal assertions of authority over them, claiming that because they have no voice in tribal politics they should not be subject to tribal controls.[6] The diminution of tribal control over non-trust lands on reservations, as well as the importance of ownership as a source of sovereignty, was signaled by several decisions from the United States Supreme Court. One of the most important of those decisions was *Brendale v Confederated Tribes and Bands of the Yakima Indian Nation*,[7] in which the Supreme Court held that the tribal government lacked jurisdiction over zoning of lands owned by non-Indians on the Yakama Reservation; conversely, the tribal government does have zoning jurisdiction over lands the United States holds in trust for the tribe or individual allottees. This reflected the growing dichotomy of jurisdiction: Tribes had authority over Indians and Indian- or tribally owned land on the reservation, but generally lacked jurisdiction over non-Indians and

non-Indian-owned lands on the reservation. In any event, *Brendale* and similar cases have put a premium on land ownership as a determinant of tribal sovereignty.[8]

In sum, although it is not the *sine qua non* of jurisdiction, land ownership on reservations has an immediate and direct effect on the scope of tribal sovereignty. Unfortunately, however, land ownership issues in Indian Country can be exceedingly complex. For example, some parcels are owned by the tribe in its corporate or sovereign status, and some lands in that category were in private hands (i.e., were "fee" lands) for some time before being repurchased by the tribe. As a result, some tribally owned lands are not held by the United States in trust for the Indians.[9] Other lands are held by allottees who have taken the land by descent, and in many cases there are numerous allottees who own fractional undivided interests in those lands. And, of course, there are the "fee" lands that usually (but not always) are held by non-Indians. With the *Brendale* and similar decisions, land ownership has become an important indicator of the scope of sovereign control that a tribe might exercise inside of the reservation. Accordingly, any increase in the category of Indian-owned lands, and particularly lands held in trust, necessarily enhances the extent of the tribe's sovereign powers on the reservation. Moreover, in some instances there may be a cascading effect; for example, if land thought to be held in fee is actually still in trust, not only would the tribe be able to assert sovereign jurisdiction over the land and activities thereon, but all of those who now and previously occupied the land could be liable in trespass.

From the foregoing, it should be clear that there are enormous incentives for tribes and for individual Indians to research and review the legal status of their own lands, as well as all lands within the external boundaries of their reservations. The purpose of such reviews would be to search for defects in the titles of fee lands as well as deficiencies in documents and proceedings that led to the creation of rights in non-Indians to reservation lands. The logical next question is what actions might the tribes and individual Indians take in the event they discover defects in non-Indians' titles or rights to occupy reservation lands. As is set forth below, the answer to that question became significantly clearer in 2001.

II. AIARMA and the Department of Interior Regulations

As suggested above, from the beginning of the trust relationship the United States assumed the role of the protector of Indians' interest. As trustee, it possessed (and possesses) legal title to Indian lands, which generally means that the United States is an indispensable party to any transaction or action intended to affect the status of property. Consequently, when tribes sought to protect their interests in land they often involved the United States, although they clearly were not required to do so.[10] When trespass issues arose, tribes and individual Indians – "allottees" – often requested that the Bureau of Indian Affairs prosecute the claims as the legal title holder. In order to clarify not only the authority of tribes to bring trespass actions independent of United States involvement, as well as to establish standards and criteria for such actions, in 1993 Congress enacted the American Indian Agricultural Resource Management Act, 103 Stat. 177 (1993) ("AIARMA").

AIARMA was passed two years after the enactment of similar legislation that targeted Indian forest resources.[11] AIARMA encompasses "Indian agricultural lands," which means "Indian lands" that are tribally and individually owned, regardless of whether such lands are on a reservation.[12] Generally, AIARMA was intended to improve agricultural management in Indian Country. Because Indian agricultural land holdings are much more extensive than Indian forest holdings and because mixed ownership is much more common in agricultural than in forest areas, it seems reasonable to expect that AIARMA ultimately will have a much more profound impact on Indian rights and tribal sovereignty. Like the forestry legislation, AIARMA also included authorization for tribal enforcement of trespass actions. One provision has proved to be quite noteworthy: Section 103 of AIARMA[13] authorized the Secretary of the Interior to adopt regulations authorizing the collection of penalties for trespasses on Indian lands; from the perspective of this article, an important element of the legislation was a provision clarifying that Indian tribes that adopted regulations implementing the legislation may without United States involvement prosecute trespass actions.[14]

The Department of the Interior's regulations implementing Section 103 provide that (i) a tribe adopting regulations conforming to AIARMA may enforce the trespass regulations without BIA involvement,[15] (ii) trespassers must be notified of the trespass charges,[16] (iii) property that is trespassing on land may be seized, and[17] (iv) trespassers may be required to pay treble damages, costs of enforcement, and attorneys' fees to the landowner.[18] Promulgation of the regulations was the last step necessary to implement the statute. The net effect of the legislation and the implementing regulations is to facilitate the vigorous protection of sovereign lands and prosecution of trespass claims in tribal court. While it is still too soon to measure the impact of AIARMA, it is expected that tribal prosecutions of trespass claims on Indian agricultural lands will come to have a significant effect on land use in some if not many reservations.

Two pro-Indian procedural rules enhance Indians' prospects for success in tribal court or elsewhere. The first procedural advantage involves the burden of proof. Congress has required that, when ownership and occupancy of lands is at issue, non-Indians be required to establish their legal right to be present in Indian Country.[19] This procedural device creates an enormous advantage for tribes and individual Indians involved in land disputes with non-Indians: All the Indian need do is raise a credible challenge to the non-Indian's right to occupy land in Indian Country. Because of the statute, the non-Indian at that point must itself establish its right to the land by a preponderance of the evidence; if the evidence is not sufficient, the non-Indian will lose its prior claim to the land.[20]

The second procedural advantage is that statutes of limitation generally do not bar tribal claims for lands held in trust by the United States; although the matter is not entirely clear, some claim that there is a six-year statute of limitations for allottee lands. The lack of a limitation for tribal lands is a consequence of the general rule that statutes of limitation do not operate against the sovereign, and the sovereign (the United States) holds legal title to the lands it holds in trust for tribes.[21] The consequences of this doctrine are several. Most important, it means that hostile non-Indian occupancy of tribal lands, for however long, cannot ripen into title under doctrines such as adverse possession or prescription. Therefore, unless the non-Indian is able to establish by a preponderance of the evidence that it has the *de jure* authorization to be on tribal lands (see preceding paragraph), it may not continue to occupy the land regardless of how long it has been there. Of significant importance is also that there may be substantial damages for past occupation of Indian lands under the AIARMA statute and BIA regulations noted above. AIARMA leads to the question of what types of trespasses might one expect to encounter on reservations, which is the topic of the following portion of this article.

III. Property Interests on the Reservation: Potential Latent Defects

A. Introduction

As noted above, with the passage of AIARMA and the BIA's promulgation of the implementing regulations, tribes now have clear authority to challenge and determine the status of interests in land that, if found to be owned by the tribe or tribal allottees, most likely would be subject to tribal jurisdiction. Upon successful prosecution of a trespass action under AIARMA, the scope of recovery includes treble damages, attorneys' fees, and costs of enforcement. In addition, as noted above, there is one very significant procedural advantages that tribes and allottees share – that the burden of proof is on the non-Indian to establish its right to the land. In addition, statutes of limitation do not run against tribes. Because of these procedural advantages and because tribes and individual Indians have clear federal authority to prosecute claims for trespass, they should consider becoming active in such endeavors. As is shown below, sovereignty can be enhanced and past wrongs can be righted by vigorous actions under AIARMA.

B. Potential Trespass Claims

The scope of potential trespass claims is broad – as broad as the range of interests in land. Property interests range from complete ownership (the right of permanent exclusive possession) to leaseholds (limited-term exclusive possession) to easements and rights of way (the right to use or to pass over the property of another), with several additional gradations of rights. All of these types of non-Indian interests in land are subject to investigation and challenge.

A trespass claim is predicated upon a belief that land rights have been violated. There are several potential applications of AIARMA in Indian Country. Of course, such an action seems designed for an allottee whose land is farmed without consent. More comprehensive actions may also be possible. For example, some tribes have encountered difficulty with non-Indians who occupy reservation lands, particularly in light of *Brendale* and other decisions, which place strong emphasis on land ownership as a basis for determining tribal jurisdiction. AIARMA provides a vehicle whereby the rights of non-Indian individuals, utilities, counties, and other occupiers of Indian lands might be tested. The first step in such an endeavor will be to determine where there are legitimate claims to non-Indian occupancy of Indian lands, including but not limited to reservation lands. This endeavor obviously will require significant effort; initially all aspects of non-Indian ownership and occupancy on the reservation should be examined and considered, including (i) fee lands owned by non-Indians, (ii) non-Indian leasehold interests on trust lands, and (iii) rights of way – road, utility, etc. – held by federal, state, county, municipal, and utility entities.

Volumes could be written about potential investigations into each of these three major areas, and the relevance and importance of each will depend upon the particular situation on each reservation. In short, there is no template or general rule to guide the investigations; the totality of the particular circumstances must govern each investigation. Having said this, there is one area that should get special attention; that is the area of utility rights of way on Indian lands.

Utility rights of way deserve special consideration because they implicate a number of concerns. First, many

utilities rely on other entities' rights when they place facilities on the reservation, and this means that an examination of the utilities' rights to occupy reservation land must necessarily trigger a broader investigation. For example, through "pole attachment agreements," a telephone utility will affix its wires to an electric distribution pole, and pursuant to a county franchise an electric utility will place its poles within a county road right of way. Second, utilities deserve special consideration because they generally have a significant impact, both positive and negative, in Indian Country. For example, although utilities provide essential services, they can contribute to environmental degradation when they are initially placed in service or when they fail, and some claim that utility facilities generally are aesthetically undesirable. Placing new utility facilities can and does result in major disruptions on the reservation, and exercising sovereignty over the land can be made more difficult if utility facilities are present. By the same token, if tribes are able to exercise greater control over the placement of utility facilities on the reservation, they will have more control not only over the present situation on the reservation but also future developments. Finally, utilities often use reservation land in order to serve customers off the reservation without providing adequate compensation for the use of that land. All of these factors militate in favor of a comprehensive and perhaps stringent review of the legality of utility facilities on the reservation.

The next question is what types of issues might arise. In any review of the legality of non-Indians' ownership or occupation of land in Indian Country, the following issues should be addressed explicitly:

- For fee lands, are there any such lands about which there have been disputes involving Indians? If so, what caused the disputes? Were the required federal approvals (BIA, Department of the Interior) obtained? What additional documentation is necessary to establish the rights of the non-Indians to be present on the land?
- For leaseholds, are there any non-Indian leasehold interests on trust lands that might be challenged? (Present law authorizes many tribes to lease land for a period of up to 99 years.) This inquiry will require at a minimum a thorough review of all of the documents that created the leasehold, including a review of required approvals by the BIA and other governmental agencies.
- Regarding road and utility rights of way, were the appropriate Department of Interior authorizations obtained? Have those documents been reviewed carefully? Were the other required federal, state, county, and municipal procedures observed? Were the roads established correctly? Specifically, were the rights of way taken for the roads in a proper manner? If the utility relies on road rights of way for locating its facilities,[22] were the proper federal authorizations obtained?[23] Once such were obtained, were the appropriate state procedures followed to the letter of the law?

Because the location of utility facilities on Indian lands can trigger the consideration of all types of real property interests (fee lands, leasehold estates, easements, and rights of way), and because utility facilities can have a significant impact on activities both on and off the reservation, how the location of such facilities might be investigated and challenged is addressed in the concluding portion of this article.

C. Investigation and Prosecution of Trespassers: Utility Facilities on Reservation Lands

There are at least two major types of significant trespass situations in Indian Country that involve utility facilities. The first involves utilities that are relying on their own rights in Indian Country; in these cases, the trespass claim will arise because the utility has placed its facilities on tribal or allottee lands without the appropriate authorization or the authorization once obtained has since expired. While generally utilities must obtain consent to place their facilities on tribal or allottee lands, in many cases this simply does not occur. In other cases the utility attempted to place its facilities in a location duly authorized but missed the mark; for example, the utility may have been intending to place the facilities within an existing easement or right of way but actually located them outside of the intended location. These problems might be the result of inattention, neglect, oversight, or other error, and almost always such errors reflect nothing more than mere negligence. Regardless of the utility's motive, however, in these cases there are credible challenges to the right of the utility to maintain its facilities in place and, because the burden of proof is on non-Indians to establish their right to occupy reservations lands,[24] and because long-term use cannot ripen into a prescriptive easement or title because the United States owns the underlying land and holds it in trust for the Indians, the utility may be hard pressed to justify the continuing presence of the trespassing facilities.

The second type of situation, which may be rare but which certainly does occur, involves utilities that relied on another party's right to occupy Indian lands; in this situation, the utility's rights are derivative. Such "derivative rights" or "piggyback" cases can be quite complex but, by

the same token, can result in major benefits to the tribes and individual Indians. Utility facilities in rights of way created for another purpose are a common example; in such cases, the utility facilities were concededly placed precisely where they were intended to be but, because the creator of the right of way was negligent, fell into error, or encountered some other problem, the utility facilities can be found to be trespassing because of the invalidity of the right of way. Because of the particular and stringent requirements for the creation of road rights of way, as well as the ubiquitous utility reliance on road rights of way for placement of facilities, this is an especially fertile field for investigation.

D. Enforcement of Trespass Actions

Assuming that the tribe or Indian landowner discovers a trespass, the next question is what mechanism(s) for trespass enforcement will be most effective. In this regard, where an enforcement action is brought will often determine the scope and substance of the proceeding. As an initial matter, it appears that there are three possible fora for raising and resolving the trespass issues set forth above – before the Department of the Interior, in tribal court,[25] and, for tribes at least, in Federal District Court. Regardless of the forum, the two procedural advantages – no running of the statute of limitations on tribal (but not allottee) lands, and non-Indian must meet burden of proof to justify its presence – will apply.

In most cases, it appears that the tactical advantage of bringing the case in tribal court, if at all possible, would outweigh factors favoring either the filing in Federal District Court or commencing an administrative case before the Department of the Interior. Tribal court is preferred because the tribe or individual Indian would have a better opportunity to develop a full record supporting its case. Moreover, any facts found by the tribal court would most likely be reviewed by the appellate Federal District Court using a "clearly erroneous" standard; unless the tribal court's factual findings were clearly in error, the Federal District Court would be bound to uphold them.[26]

Although most cases should be brought in tribal court, if there are few specific facts in dispute and if larger issues of policy predominate, the claimant may want to take the case to the Federal District Court in the first instance. Finally, to the extent that the Department of the Interior itself was involved circumstances that led to the present trespasses (for example, if the Department of the Interior had authorized the road rights of way but the county failed to follow mandated state procedures for opening them), the administrative tribunal may be an appropriate starting point prior to filing a formal complaint.

Finally, brief mention should be made about potential damages. The presentation of a formula for calculating damages for trespass is beyond the scope of this article; any damage calculation will have to involve both attorneys experienced in valuation of utility properties and facilities as well as expert appraisers. It does appear, however, that there could be very substantial damages in many instances. There are two reasons for this. First, for tribal lands at least, there may be no effective limit on the length of time for the accrual of damages; the right to recovery may go back to the date of the inception of the trespass – which could well have been decades ago. In such a case, it may be appropriate to add interest to past damages in order to reflect the present value of money. Second, under the AIARMA regulations the damages are to be trebled – for each dollar in actual harm suffered, two additional dollars are required to be paid to the claimant. And finally, the trespasser is also responsible for not only damages but also all costs of enforcement, including specifically attorneys' fees, expert witness fees, and other charges. In sum, the magnitude of potential damages could be quite large. It does indeed appear that Congress created real incentives for Indians and tribes to police their property interests and put an end to trespasses on the reservation.

IV. Summary and Conclusion

Indians today are still being victimized by the misguided efforts beginning more than a century ago to force their people into the mainstream of American life; the land problems that were created during the 1887-1934 period continue today to vex and inhibit Indian life and culture on the reservation. The land problems created during that period are increasingly complex and severe; ownership patterns on many reservations look like a crazy quilt. AIARMA has created powerful incentives for Indians to address some of the longstanding problems on the reservation – trespasses by non-Indians. Perhaps the most fruitful area for investigation involves utility facilities on the reservation, either on rights of way owned by the utilities themselves or on road and other rights of way owned by third parties. In the event that trespasses are found, Congress has mandated that those responsible pay not only three times the actual damages (which most often will involve many years of occupancy), the trespassers must also pay enforcement costs and attorneys' fees. Under those circumstances, it is likely that appropriate expert help will be available to tribes and individual Indians wishing to enhance tribal sovereignty by rectifying existing trespasses on the reservation.

Endnotes

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[1] "Indian Country" is a term of art. The definition in the federal criminal code, 18 U.S.C. § 1151, which is generally used for non-criminal matters, is as follows:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, 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 rights-of-way running through the reservation,
>
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
>
> (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

[2] As the Supreme Court stated, the objects of the allotment policy were "to end tribal land ownership and to substitute private ownership, on the view that private ownership by individual Indians would better advance their assimilation as self-supporting members of our society and relieve the Federal Government of the need to continue supervision of Indian affairs." *Northern Cheyenne Tribe v. Hollowbreast*, 426 U.S. 649, 650 n.1 (1976).

[3] Act of Feb. 8, 1887, 24 Stat. 388.

[4] *Id.* § 5, 24 Stat. 388, 389-90.

[5] *See, e.g.*, Public Act 58-3, 33 Stat. 595 (sale of "surplus" lands on Yakama Reservation).

[6] *See, e.g., http://www.citizensalliance.org*.

[7] 492 U.S. 408 (1989) ("*Brendale*"). Under the *Brendale* ruling, land ownership was the primary and almost exclusive determinant in deciding whether a tribe acting in its sovereign status or a county had control over land on a reservation that had by treaty been reserved to exclusive Indian use. In the case of the Yakama Nation, a substantial percentage of the high-value farmlands in the Yakima County basin were owned by non-Indians, while the Indians owned the remainder, and the result was that zoning in the basin became at best chaotic. Where the Indians had predominant control over lands in the area, their zoning control extended to non-Indian owned land. In *Nevada v. Hicks*, 533 U.S. 353 (2001), the Supreme Court held that the tribal sovereign lacked authority to preclude state pursuit of criminal prosecution on the reservation for off-reservation actions, and that tribal court jurisdiction did not extend to judicial review of state prosecutorial actions on the reservation.

[8] Ownership of land may be a necessary condition for tribal jurisdiction, but it is not necessarily sufficient – particularly in criminal matters. *See Nevada v. Hicks*, 533 U.S. 353. (2001) (tribe lacked jurisdiction to entertain challenge to legality of state official's search of Indian-owned land for contraband).

[9] Federal approval is required to transfer land into trust status. 25 U.S.C. § 566d. The BIA regulations set forth the standards that are to be considered in deciding whether the United States will accept the transfer. *See* 25 CFR § 151.10.

[10] *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (Indian tribe may bring action for money damages consequent to county's wrongful purchase of Indian lands; contribution action against state is barred by eleventh amendment); *Washoe Tribe v. Southwest Gas Co.*, 2000 U.S. DIST. LEXIS 7087 (D. Nev. 2000) (tribe brought trespass action without United States involvement). On the other hand, when the litigation is intended to affect the title of the land itself, the United States is an indispensable party. *United States v. Minnesota*, 305 U.S. 382 (1939); *United States v. Southern Pacific Transport Co.*, 543 F.2d 676 (9th Cir. 1976) (quiet title action). Trespass actions are intended to affirm, not change or clarify, ownership of land, and therefore it appears that the United States is not an indispensable party to such litigation.

[11] AIARMA was modeled largely on the National Indian Forest Resources Management Act of 1990, Pub. L. 101-630, 104 Stat. 4531, *codified at* 25 USC § 3106. The latter legislation has trespass provisions upon which AIARMA was based, and the forestry regulations addressing trespasses on forest lands are set forth at 25 C.F.R. § 163.29.

[12] The definitions of AIARMA are codified at 25 U.S.C. § 3703.

[13] *Codified at* 25 U.S.C. § 3713. That section provides:

> (a) CIVIL PENALTIES; REGULATIONS- Not later than one year after the date of enactment of this Act, the Secretary shall issue regulations that—
>
> (1) establish civil penalties for the commission of trespass on Indian agricultural lands, which provide for—
>
> (A) collection of the value of the products illegally used or removed plus a penalty of double their values;
>
> (B) collection of the costs associated with damage to the Indian agricultural lands caused by the act of trespass; and
>
> (C) collection of the costs associated with enforcement of the regulations, including field examination and survey, damage appraisal, investigation assistance and reports, witness expenses, demand letters, court costs, and attorney fees;
>
> (2) designate responsibility within the Department of the Interior for the detection and investigation of Indian agricultural lands trespass; and
>
> (3) set forth responsibilities and procedures for the assessment and collection of civil penalties.
>
> (b) TREATMENT OF PROCEEDS- The proceeds of civil penalties collected under this section shall be treated as proceeds from the sale of agricultural products from the Indian agricultural lands upon which such trespass occurred.
>
> (c) CONCURRENT JURISDICTION- Indian tribes which adopt the regulations promulgated by the Secretary pursuant to subsection (a) shall have concurrent jurisdiction with the United States to enforce the provisions of this section and the regulations promulgated thereunder. The Bureau and other agencies of the Federal Government shall, at the request of the tribal government, defer to tribal prosecutions of Indian agricultural land trespass cases. Tribal court judgments regarding agricultural trespass shall be entitled to full faith and credit in Federal and State courts to the same extent as a Federal court judgment obtained under this section. Nothing in this Act shall be construed to diminish the sovereign authority of Indian tribes with respect to trespass.

[14] AIARMA § 103(c). It is important to note one very important limitation on the scope of AIARMA: It applies only to lands held by the United States in trust for Indians or Indian lands that are subject to a restraint on alienation. AIARMA § 4(9) (definition of "Indian Land").

[15] 25 C.F.R. § 166.802 (2003).

[16] *Id.* § 166.803.

[17] *Id.* § 166.806.

[18] *Id.* § 166.812.

[19] 25 U.S.C. § 194 provides:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

[20] *See Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979).

[21] The general rule is that statutes of limitation do not apply to the sovereign. *See Custer v. McCutcheon*, 283 U.S. 514 (1931). In addition to the general common law prohibition against statutes of limitation applying to the sovereign, there is a statutory prohibition against acquisition of title from an Indian or tribe "except by treaty or a convention entered into pursuant to the Constitution." 25 U.S.C. § 177; *see United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 334 (9th Cir. 1956). This general rule has been applied in the Indian context. *See, e.g., County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (Indians' right to sue not subject to statute of limitations); *Washoe Tribe v. Southwest Gas Corp.*, 2000 U.S. DIST. LEXIS 7087 (D. Nev. 2000) (Indian Claim Limitations Act does not apply to litigation brought by and in the name of tribe). However, there is a strong argument that the Indian Claim Limitations Act, which has a six-year statute of limitations, does apply to allottees' lands. *See id.*

[22] In *United States v. Oklahoma Gas & Electric Co.*, 318 U.S. 206, 209-10 (1943), the Supreme Court held that state law is to be used to determine whether utility facilities may be located within a valid road right of way over Indian lands without Indian consent. In that case, the Department of the Interior asserted that utilities must obtain separate permission to locate facilities in Indian Country. The Supreme Court interpreted the language, "in accordance with the laws of the State or Territory in which the lands are situated" of 25 U.S.C. § 311 to allow state to decide: (i) which state agency builds the road; (ii) how the road shall be financed; (iii) road specifications; and (iv) the various uses authorized – which includes the location and continued presence of utility facilities. Although *Oklahoma Gas & Electric Co.* was applied to Indian lands no on a reservation and although it explicitly reserved the question of its application to reservation lands, a Montana federal court has determined that the decision applies with equal force to lands within a reservation. *United States v. Mountain States Tel. & Tel.*, 434 F.Supp. 625 (D. Mont. 1977).

[23] This can be a very thorny issue; in Idaho, for example, counties often rely on the doctrine of prescription to establish and maintain county roads, and that doctrine simply cannot be successful if the lands are held by the United States in trust for a tribe or allottees.

[24] *See* note 18 *supra* and accompanying text.

[25] Of course, under AIARMA's trespass provisions the tribe must first adopt legislation incorporating or adhering to the trespass provisions set forth in the Department of the Interior regulations. Moreover, before attempting a filing in tribal court, however, the rules of that court must be consulted; in some instances, it may be necessary for the tribal council or other tribal legislative body to enact legislation authorizing the bringing of trespass actions in tribal court.