State Attorneys General Powers and Responsibilities

Edited by
Emily Myers
National Association of Attorneys General

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This book is dedicated to Attorneys General and the men and women who work for them in the 56 jurisdictions. They continue to make an important contribution to state govenment and the American legal system. Without them, there would be no book to write.

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This book builds on previous editions, which were edited by Lynne Ross. We gratefully acknowledge her hard work and dedication to this project in its early years.

This book is a collaborative effort, in which different authors with expertise in each substantive area contribute their time and talent. The principal authors are noted on each chapter, but we would like to thank them again here for their hard work and dedication. Many thanks to the following authors:

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Chapter 11

Indian Law

By Chris Coppin, former Legal Director, Conference of Western Attorneys General (CWAG) and Chief Editor, CWAG American Indian Law Deskbook

The history of tribal-state relations has been stormy since the founding of the Republic, and even in modern times, state attorneys general have been thrust into the field in litigation, legislation and policy battles to defend state interests. Thirty-seven states have federally recognized Indian tribes within their borders, making Indian law an inevitable part of the duties of most state attorneys general.[1]

As a project of state attorneys general, the Conference of Western Attorneys General (CWAG) first published in 1991 a treatise on Indian law, the *American Indian Law Deskbook,* which is updated annually.[2] While this Chapter provides

1 States currently without federally-recognized Indian tribes are principally those in the mid-Atlantic belt and inland, including Pennsylvania, Delaware, New Jersey, West Virginia, Maryland, Ohio, Indiana, Illinois, Tennessee, Kentucky, Arkansas, as well as Georgia, New Hampshire and Vermont. The Pamunkey Indian Tribe of Virginia gained federal recognition in 2016. *See* 81 F.R. 26826 (May 4, 2016). Several of these states have state-recognized tribes and/or tribal groups that have petitioned for federal recognition. Hawaii is not included in this counting.

2 Conference of Western Attorneys General, American Indian Law Deskbook (Thomson Reuters 2016), State attorney general offices from throughout the country have cooperated in compiling key decisional and statutory law for chapters covering topics ranging from civil regulatory and adjudicatory authority in Indian country to hunting and fishing regulation. Much of the material contained in this Chapter comes from the Deskbook. Thus, it is appropriate to thank long time Deskbook contributors, such as Clay Smith of Idaho (civil jurisdiction), Fronda Woods of Washington (hunting and fishing), Dawn Williams of Arizona (Indian Child Welfare Act), Jennifer Henderson of California (Indian Gaming Regulatory act), Charles Carvell of North Dakota (Indian land and property), Kirsten Jasper of South Dakota (Indian country), Stephanie Striffler of Oregon (state-tribal cooperative agreements), Rob Costello of Washington (taxation) and Jackie Shafer of Washington (Indian Child Welfare Act) for their work. A special thank you also to Tom Gede of Morgan, Lewis and Bockius for his prior work on this Chapter.

a rough outline of key Indian law topics, the state attorney general is encouraged to utilize the *Deskbook* for an in-depth understanding of complex Indian law questions.[3]

Historical, Constitutional and Judicial Foundations of Indian Law

Indian law has developed as the product of a checkered history of confrontation, accommodation and policy reversals. As stated by Oregon Attorney General Hardy Myers:

> Where that history arose in the conflicts of Indians and white settlers, it now functions in the context of a multi-cultural society, dedicated to civil rights and racial equality. The unique political sovereignty of Indian tribes is not well understood in society at large, giving rise to further misunderstandings not borne of animosity toward Indians, but keenly felt by tribes nonetheless. Therefore, most Indian legal and policy disputes bring with them layers of historical, political and social assumptions that require careful and detached consideration.[4]

Perhaps more than in any other legal field, Indian law draws on discrete historical events: alliances formed during warfare, treaties entered into and in some cases abrogated, major changes in policy and shifts in public attitudes. Modern Indian law has its roots in the great power struggles between England and France for control of North America during the seventeenth and eighteenth centuries. Powerful, well-organized Indian nations, such as the Iroquois and the Delaware, were crucial military allies courted by the European powers. These tribes were treated as distinct political, cultural, and economic entities—sovereigns within the areas they controlled. The European nations dealt with the Indians by treaty, a tradition that continued after the American Revolution.

3 Practitioners are also directed to the newly updated Cohen, Handbook of Federal Indian Law, 2012 ed. (LexisNexis 2012), and to Canby, American Indian Law (4th Ed., Nutshell Series).

4 American Indian Law Deskbook, Introduction, (2017 Edition).

In light of confusion in the Articles of Confederation as to the authority of states to regulate commerce with Indian nations, in the new Constitution, exclusive authority to deal with the Indians was vested in the new federal government. Accordingly, Article I, section 8, clause 3 of the United States Constitution empowers Congress "[t]o regulate commerce … with the Indian tribes." The effect of the Indian Commerce Clause is to make "Indian relations . . . the exclusive province of federal law."[5] Congress' power with respect to Indian affairs is regarded as "plenary," meaning complete and thorough, though not absolute.[6] As noted below, it generally excludes the exercise of state power, but not always and not completely.

In *Cherokee Nation v. Georgia*[7], Chief Justice John Marshall articulated a view of Indian tribes' legal status that has largely governed the development of modern Indian law. The issue there was whether the Cherokee Nation was a "foreign state" within the meaning of Article III, section 2 of the Constitution. While holding the Cherokee Nation was not a foreign state for jurisdictional purposes, the Chief Justice stated that Indian tribes "may, more correctly, perhaps, be denominated *domestic dependent nations*."[8] The Chief Justice also suggested the tribes are in a "state of pupilage," thereby articulating the notion that the United States acts as a guardian for the Indian tribes, providing protection, in a trust relationship between the United States and the Indian nations.[9]

Cherokee Nation followed an earlier decision of the Court in *Johnson v. McIntosh*,[10] where Chief Justice Marshall held invalid a conveyance to private individuals by tribal chiefs of lands occupied by their tribes. He found the tribes' rights to complete sovereignty, as independent nations, were "necessarily diminished" by the principle that "discovery gave exclusive title to those that made it."[11] Subsequently, in *Worcester v. Georgia*,[12] Chief Justice Marshall invalidated a law of the State of Georgia under which a church minister was convicted for living in the Cherokee Nation without a license from the state.[13] Giving meaning to the Indian Commerce Clause and the Supremacy Clause of the Constitution, the Chief Justice stated that the Cherokee Nation was "a distinct community, occupying its

5 *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985).
6 *See United States v. Dion*, 476 U.S. 734 (1986); *South Dakota v. Bourland*, 508 U.S. 679 (1993).
7 30 U.S. (5 Pet.) 1 (1831).
8 *Id*. at 17-18.
9 *Id.*
10 21 U.S. (8 Wheat.) 543 (1823).
11 *Id*. at 574.
12 31 U.S. (6 Pet.) 515 (1832).
13 *Id*. at 536-41.

own territory . . . 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" and that "[t]he whole intercourse between the United States and this nation . . . is vested in the government of the United States."[14] The three decisions taken together have collectively been referred to as the "Marshall trilogy," and generally stand for the following principles of Indian law,

> (1) by virtue of aboriginal political and territorial status, Indian tribes possessed certain incidents of preexisting sovereignty; (2) this sovereignty was subject to diminution or elimination by the United States but not by the individual states; and (3) the tribes' limited inherent sovereignty and their corresponding dependency upon the United States for protection imposed on the latter a trust responsibility.[15]

Notwithstanding the displacement of state law articulated in *Worcester v. Georgia*, encroachment by settlers in Indian country in the early 1800's became substantial. Tribes were moved, often forcibly, to Indian territories.

As pioneer settlements continued, the concept of tribes as domestic nations eroded. States were determined to have some legal authority over non-Indians in tribal areas.[16] In 1871, Congress disavowed its intention to enter into any further treaties with Indian tribes, declaring that "hereafter, no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized an independent nation, tribe or power with whom the United States may contract by treaty * * *."[17]

This marked the formal beginning of a period of aggressive federal efforts to assimilate Indians into the American mainstream. Special Indian schools were established to westernize the children, and the foundations of the modern Bureau of Indian Affairs were laid.[18] In 1887, Congress adopted the Dawes Act, which allotted tribal lands on a fee simple basis to individual Indians, the goal being Indian assimilation into American culture. This legislation led to a massive selling of Indian land and resulted in non-Indians outnumbering Indians on some

14 *Id.* at 561.

15 American Indian Law Deskbook, *supra*, at § 1.1.

16 *United States v. McBratney,* 104 U.S. 621 (1881); *Draper v. United States,* 164 U.S. 240(1896).

17 16 Stat. 566 (codified at 25 U.S.C. § 71).

18 Cohen, Handbook of Federal Indian Law 127-43 (1982 ed.).

modern reservations.[19] In the 1930s, a new era in federal Indian policy began. The Indian Reorganization Act of 1934 (IRA) terminated the allotment system and nurtured tribal self-government.[20] A policy of self-determination replaced the policy of forced individual assimilation. Tribes were provided legal tools to improve reservation economies, including increased authority to facilitate entering into contracts.[21] Ultimately, two thirds of the tribes adopted constitutions and established tribal councils under authority of the act.

After World War II, federal authorities re-embraced the policy of assimilation. By concurrent resolution in 1953, Congress stated that "it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States."[22] Consistent with this policy, Congress enacted Public Law 280 (P.L. 280)[23], which facially extended state law over criminal and civil matters, with narrow exceptions, to reservations in six states.[24] Other states were permitted to "opt in," although, like the original "mandatory" states, no provision for tribal consent to the application of state law was present.[25] Subsequently, federal legislation was enacted to terminate numerous reservations with a view toward ultimately distributing reservation land and assets to individual

19 During the life of the allotment provisions of the Dawes Act from 1887-1934, Indians lost approximately two thirds of their reservation lands. *See* Cohen, *supra*, at 216, *quoting Hearings on H.R. 7902 of the House Comm. on Indian Affairs, 73d Cong., 2d Sess. 15-18 (1934) (memorandum by Commissioner Collier).* Reservations with more non-Indians tribal members include Uintah and Ouray in Utah, Flathead in Montana, Nez Perce in Idaho, and Yakima in Washington.

20 Act of June 18, 1934, § 5, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101 - 5129).

21 Grimsrud, *Doing Business on an Indian Reservation: Can the Non-Indian Enforce His Contract with the Tribe?,* 1981 B.Y.U.L. Rev. 319 (1981).

22 House Con. Res. 108, 67 Stat. B132 (Aug. 1, 1953).

23 Pub. L. 83-280, codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360.

24 The original "mandatory" P.L. 280 states were California, Minnesota (except for the Red Lake Indian Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin; Alaska was added by amendment, *see* Pub. L. No. 85-615, § 2, 72 Stat. 545 (1958). Nebraska and Wisconsin have since retroceded, or returned, some jurisdiction to tribal and federal authorities.

25 Eight states that had disclaimers over Indian lands in their enabling acts or constitutions were permitted, by amending their disclaimer provisions, to assume civil and criminal jurisdiction. *See* discussion in *Washington v. Yakima Indian Nation,* 439 U.S. 463 (1979). These states are Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington. Arizona, Montana, North Dakota, Oklahoma, New Mexico, and Washington have assumed either full or partial jurisdiction. South Dakota retroceded jurisdiction in 1964. Four assumed jurisdiction by legislative action. These states are Nevada, Florida, Idaho, and Iowa. Nevada retroceded its jurisdiction in 1973.

tribal members.[26] Then, contemporaneously with the civil rights movement of the 1960s and 1970s, the federal policy pendulum swung away from the assimilation policies of the 1950s. In 1968, Congress enacted the Indian Civil Rights Act to provide selected due process protections in tribal judicial proceedings.[27] P.L. 280 was amended to require tribal consent to a state's assumption of civil and criminal jurisdiction.

In 1976, the Supreme Court decided the first of a series of cases limiting the scope of P.L. 280,[28] noting that P.L. 280 was not intended to grant states broad civil regulatory authority over Indian country. Other federal courts decided a number of historic land claims in favor of the tribes, and Acts of Congress reversed terminations of various reservations.[29] In 1978, Congress adopted the Indian Child Welfare Act (ICWA), which recognized special tribal jurisdiction over any child custody proceeding involving an Indian child.[30] Throughout this period, Congress appropriated funds, usually administered by the Bureau of Indian Affairs, to improve Indian education, health, and tribal economies through the development of on-reservation enterprises.

In the 1980s, the quickening pace of tribal economic activity tested the bounds of authority of tribes and federal, state, and local governments. The extent and reach of inherent tribal sovereignty, state regulatory authority and federal regulatory authority in Indian country have remained critical questions for federal and state courts, ranging from questions concerning the ability of Indians to hunt or fish without regard to state conservation efforts[31] to tribal obligation to pay state taxes for commodities such as cigarettes that are sold to non-Indians.[32]

Indians, Indian Tribes and Indian Country

Critical to an understanding of Indian law is the status of a person as an "Indian." Both common law and statutory definitions play a role, but ultimately, Indian "status" may require both an ancestral or racial component *and* some

26 *See, e.g.*, 72 Stat. 619 (California Mission Rancherias); Act of Sept. 1, 1954, ch. 1207, Stat. 1099, (1970) (various tribes in Utah); Act of August 1954, ch. 1009, 68 Stat. 868, (1970).

27 25 U.S.C. §§ 1301-1341.

28 *Bryan v. Itasca County*, 426 U.S. 373 (1976).

29 *See, e.g.,* the Menominee Restoration Act of 1973, Pub. L. No. 93-197, 87 Stat. 770; the Siletz Restoration Act of 1977, Pub. L No. 95-195, 91 Stat. 1415.

30 25 U.S.C. §§ 1901-1963.

31 *See, e.g., New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (fish and wildlife); *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985).

32 *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

form of political affiliation with an Indian tribe.[33] The latter, however, may not rest solely on simple membership in a tribe, but may involve enjoying benefits of tribal affiliation or social recognition as an Indian from participation in Indian social life.[34] The Indian Reorganization Act defines "Indian" as: "[T]he term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood."[35] These definitions are important for various and different purposes, including eligibility for federal programs or similar matters.

As to whether classifications based on a racial or ancestral basis implicate the Fifth Amendment's Due Process Clause, the Supreme Court held in *Morton v. Mancari*[36] that an employment preference for Indians at the Bureau of Indian Affairs did not trigger the higher strict scrutiny standard for such classifications, as the preference was "political, rather than racial in nature," and the preference was "reasonably and directly related to a legitimate, non-racially based goal"—that of making the "BIA more responsive to the needs of its constituent groups."[37] The full scope of the *Mancari* decision remains unclear, as the Supreme Court did not seem inclined to extend the lower "rational basis" test to classifications not encompassed by the goals of BIA employment, as in *Rice v. Cayetano*,[38] where the Court invalidated a Hawaiian state election scheme for trustees of the Office of Hawaiian Affairs that restricted eligible voters to "Hawaiians" defined on the basis of ancestry.

The definition of an "Indian tribe" similarly has developed through judicial and statutory determinations, starting over a century ago where a tribe was referred to as a "body of Indians of the same or similar race, united in a community under one leadership or government, inhabiting a particular though sometimes ill-defined territory."[39] Congress, of course, under its plenary power, may always "recognize" a tribe, but eventually it required procedures for the Bureau of Indian Affairs to acknowledge and periodically list tribes as "federally

33 *See, e.g., United States v. Rogers*, 45 U.S. (4 How.) 567 (1846).
34 *See, e.g., St. Cloud v. United States*, 702 F. Supp. 1456, 1461 (D.S.D. 1988).
35 Indian Reorganization Act (IRA), 25 U.S.C. § 5129.
36 417 U.S. 535 (1974).
37 *Id.*, at 554.
38 528 U.S. 495 (2000).
39 *Montoya v. United States*, 180 U.S. 261, 266 (1901).

acknowledged."[40] Generally incorporating judicially-developed criteria for acknowledgment of an Indian group as an Indian tribe, the BIA has established rigorous procedures for federal "acknowledgment" as a tribe.[41] These criteria, which include proof of genealogical, historical and political facts, are generally considered difficult to establish. State attorneys general, evaluating whether a petitioning Indian group is entitled to federal acknowledgment, occasionally weigh in with comments and views concerning the petitioning Indian group's submission.[42]

"Indian country" is a legal term of art that originally and specifically defined certain lands for federal criminal law purposes. Congress, in the federal criminal code, defined "Indian country" as:

> (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 the original or subsequently acquired territory thereof, and 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.

Lands falling within the statutory definition are subject to certain complex rules for the allocation of criminal jurisdiction, discussed below. However, the definition has been utilized to determine the geographical reach of special Indian law rules governing preemption of state law in civil contexts.[43] Special rules may apply to Indian lands established by various Indian claims settlement acts passed

40 25 U.S.C. § 5129.

41 25 C.F.R. Part 83. This provision was substantially changed and updated in 2015. *See* 80 FR 37888 (July 1, 2015).

42 *See, e.g.*, Request for Reconsideration of the State of Connecticut and the Towns of North Stonington, Preston and Ledyard On the Final Determination of the Assistant Secretary on the Petitions for Tribal Acknowledgment of the Eastern Pequot Indians of Connecticut and the Paucatuck Eastern Pequot Indians of Connecticut (September 26, 2002).

43 *See, e.g., Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998) (Court has "recognized" that 18 U.S.C. § 1151 "generally applies to questions of civil jurisdiction"); *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114 (1993) (applying § 1151 in a challenge to state taxes); *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995) (same).

by Congress since 1978 to resolve tribal title claims,[44] as well as the unique act settling native claims in the Alaska Native Claims Settlement Act.[45]

Land occupancy and ownership issues present significant difficulties for state attorneys general, who are often called upon to determine whether title vests with a tribe and whether or not certain statutes do or do not apply. The IRA authorizes the Secretary of the Interior to acquire land for Indians within or without reservations and to hold such land in trust.[46] In 2009, the U.S. Supreme Court restricted the ability of the Secretary of Interior to take land in trust for the benefit of an Indian tribe under the IRA.[47] The decision limited the Secretary's authority to take land for the benefit only of tribes that were under federal jurisdiction when the IRA became law in 1934. The decision was welcomed by States that worried about a proliferation of removals of land taken from state and local jurisdiction by the federal government. The subject of intense commentary and criticism,[48] the *Carcieri* decision disrupted almost seventy years of the Secretary's taking land in trust for tribes that were federally recognized *after* 1934, and has led to calls for a congressional "*Carcieri* fix." The Solicitor for the Department of the Interior has issued a formal opinion interpreting what "now under Federal jurisdiction" means.[49]. While trust land is specifically included as eligible for Indian gaming under the specific statute governing that activity, it remains to be determined what other jurisdictional rules apply there, particularly when the trust land is located off reservation.

44 *See, e.g.*, Rhode Island Indian Claims Settlement Act, Pub. L. 95-395, Sept.30, 1978, 92 Stat. 813; Maine Indian Claims Settlement Act Pub. L. 96-420, Oct. 10, 1980, 94 Stat. 1785; Florida Indian (Miccosukee) Land Claims Settlement Act Pub. L. 97-399, Dec.31, 1982, 96 Stat. 2012; Connecticut Indian Land Claims Settlement Act Pub. L. 98-134, Oct. 18, 1983, 97 Stat. 851; Massachusetts Indian Land Claims Settlement Act Pub. L. 100-95, Aug. 18, 1987, 101 Stat. 704; Florida Indian (Seminole) Land Claims Settlement Act Pub. L. 100-228, Dec. 31, 1987, 101 Stat. 1556; Washington Indian (Puyallup) Land Claims Settlement Act Pub. L. 101-41, June 21, 1989, 103 Stat. 83; Seneca Nation (New York) Land Claims Settlement Act Pub. L. 101-503, Nov. 3, 1990, 104 Stat. 1292; Mohegan Nation (Connecticut) Land Claims Settlement Act Pub. L. 103-377, Oct. 19, 1994, 108 Stat. 3501; Crow Boundary Settlement Act Pub. L. 103-444, Nov. 2, 1994, 108 Stat. 4632.

45 Pub. L. 92-203 (1971), codified at 43 U.S.C. § 1601 *et seq.*

46 25 U.S.C. § 5108.

47 *Carcieri v. Salazar*, 555 U.S. 379 (1979).

48 *See, e.g.*, Amanda D. Hettler, Beyond a Carcieri Fix: The Need for Broader Reform of the Land-into-Trust Process of the Indian Reorganization Act of 1934, 96 Iowa L.R. 1377, 1379-82 (2011).

49 Department of the Interior M-37029, March 12, 2014, (discussing the Department's interpretation, and subsequent application of, the phrase "now under Federal jurisdiction" following the Supreme Court's decision in Carcieri v. Salazar).

Complex litigation over the status of reservation land that was removed or disestablished has resulted in the need to examine each claim of jurisdiction carefully. In some cases, reservations were either disestablished or "diminished" in size and scope as part of the decades-long process of opening reservations and disposing of surplus lands in the mid-to-late-nineteenth century.[50] However, tribal governmental jurisdiction may still apply in certain of these lands, even where title no longer rests with the Indian tribe but the land remains within the exterior boundaries of a reservation, which boundaries have not been erased.[51] Navigable waters and tidelands, title of which is generally understood to be held by the States under the Equal Footing Doctrine, may also be subject to claims of tribal ownership under a pre-statehood reservation.[52]

Specific Areas of the Law

Criminal Jurisdiction

The general rule is that states are divested of most, but not all, criminal jurisdiction on lands that fall within the definition of Indian country. Except for those states where Congress has specifically provided for the assumption of criminal law authority in Indian country by those states, the criminal law authority is assumed by the federal government, occasionally concurrently with the tribal governments, unless the offender is a non-Indian and the victim of the crime is a non-Indian or it is a victimless crime. To determine which government has criminal jurisdiction in Indian country, one looks to the location and nature of the offense and the Indian or non-Indian status of the offender and victim. The need to simplify and improve on this complex maze of jurisdiction in Indian country is one of the findings of the Tribal Law and Order Act of 2010 (TLOA).[53] The TLOA finds that the jurisdictional complexities have a significant negative impact on the ability to provide public safety to Indian communities, have been

50 *See* Deskbook, § 3.4.

51 *Nebraska v. Parker*, 136 S. Ct. 1072 (2016).

52 *Id.*; *see Confederated Salish and Kootenai Tribes v. Namen,* 665 F.2d 951 (9th Cir. 1982), *cert. den.*, 459 U.S. 977 (1982); *Puyallup Indian Tribe v. Port of Tacoma,* 717 F.2d 1251 (9th Cir. 1983), *cert den.*, 465 U.S. 1049 (1984). *See also* Deskbook, § 3.5-3.7.

53 Public Law 111-211, Title II; 124 Stat. 2261 *et seq*. (July 29, 2010).

exploited by criminals, and require a high degree of commitment and cooperation among tribal, federal, and State law enforcement officials.[54]

The principal federal statutes governing criminal jurisdiction in Indian country are (1) the General Crimes Act (GCA),[55] (2) the Major Crimes Act (MCA),[56] and (3) Public Law 280,[57] which confers upon certain states criminal jurisdiction over all crimes within Indian country. Except for crimes committed by one Indian against the person or property of another Indian, the General Crimes Act provides that general laws of the United States for offenses committed in the sole and exclusive jurisdiction of the United States extends to Indian country. This refers to "enclave" laws, those enacted by Congress under its admiralty, maritime, and property powers, governing enclaves such as national parks. Among the general enclave laws included under the General Crimes Act is the Assimilative Crimes Act,[58] which effectively incorporates state criminal offenses where there is no "enclave law" covering particular conduct, but the conduct is nonetheless punishable under state law.[59] Other federal criminal laws that proscribe conduct regardless of location also apply generally in Indian country.

The Indian-against-Indian exception in the GCA reflects congressional intent to defer to tribal governments to prosecute tribal members who offend against other Indians,[60] and such prosecutions are generally not barred by double jeopardy following a federal prosecution.[61] However, in a major judicial statement articulating an implicit divestiture of inherent tribal governmental sovereignty, the U.S. Supreme Court in *Oliphant v. Suquamish Indian Tribe* held that Indian country crimes committed by non-Indians against the persons or property of Indians are not subject to prosecution and punishment by tribal governments.[62] In *Duro v. Reina*,[63] the Supreme Court further held that tribes lack inherent authority to prosecute nonmember Indians for offenses committed against members, equating nonmember Indian status to that of non-Indians. Congress reacted to the *Duro* decision by amending the Indian Civil Rights Act to establish tribal

54 *Id*., at § 202(a)(4).
55 18 U.S.C. § 1152.
56 18 U.S.C. § 1153.
57 Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321–1325, and 28 U.S.C. § 1360).
58 18 U.S.C. § 13.
59 *United States v. Ashley*, 255 F.3d 907, 909 n.3 (8th Cir. 2001).
60 *See United States v. Percy*, 250 F.3d 720 (9th Cir. 2001), *cert den.,* 534 U.S. 1009 (2001).
61 *United States v. Wheeler*, 435 U.S. 313 (1978).
62 *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).
63 495 U.S. 676 (1990).

criminal jurisdiction over non-member Indians, which authority was upheld in *United States v. Lara*.[64]

The Major Crimes Act was enacted by Congress in 1885 in response to the decision in *Ex parte Kan-gi-shun-ca (Crow Dog)*,[65] which voided a murder conviction under the General Crimes Act where one Indian had killed another, on the basis of the Act's Indian-against-Indian exception.[66] Accordingly, to cover the "gap," Congress provided that certain "major" offenses would be punishable under federal law when committed by an Indian against the person or property of another. Among the offenses included are murder, manslaughter, kidnapping, maiming, incest, various assaults, arson, burglary, robbery, and similar major offenses. The grant of authority in the GCA and MCA is exclusive of state authority to enforce the relevant criminal provisions, the states being expressly displaced by Congress under its powers in the Indian Commerce Clause.[67] Typically, offenders are arrested and these crimes investigated by the Federal Bureau of Investigation, Bureau of Indian Affairs special police or those holding special commissions to exercise federal criminal law in Indian country; United States Attorneys prosecute these crimes.

In a significant grant of authority, Congress allowed certain states to assume criminal law authority within Indian country in Public Law 280.[68] In 1953, Congress provided for this assumption in five states—California, Minnesota (excluding the Red Lake Tribe), Nebraska, Oregon (excluding the Warm Springs Tribe) and Wisconsin—with the later addition of Alaska, making it six states, all of which typically are called the "mandatory" states. It also allowed states to "opt in" to P.L. 280, and several states, such as Idaho, Nevada and Washington did so. The grant provides that the affected states have jurisdiction "over offenses committed by or against Indians" "to the same extent that such State . . . has jurisdiction over offenses committed elsewhere within the State . . . , and the criminal laws of such State . . . shall have the same force and effect within such Indian country as they have elsewhere within the State . . ."[69] In short, crimes committed in Indian country in such states are treated the same as those committed outside of Indian country.

64 541 U.S. 193 (2004).

65 109 U.S. 556 (1883).

66 *See Keeble v. United States*, 412 U.S. 205, 209 (1973).

67 *See United States v. Kagama*, 118 U.S. 375 (1886); *see also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *United States v. Lomayaoma*, 86 F.3d 142, 144–46 (9th Cir. 1996), *cert. den.*, 519 U.S. 909 (1996).

68 Pub. L. No. 83-280, 67 Stat. 588 (1953).

69 *Id.*

Until amended in 1968, Public Law 280 did not allow for tribes to consent to the jurisdiction; those amendments also permitted states to retrocede the jurisdiction back to the federal government.[70] Tribes likely retain concurrent criminal jurisdiction over their own members in both mandatory and nonmandatory states.[71] In 2010, Congress provided in the TLOA that in a mandatory Public Law 280 State, a tribe may request the United States to assume concurrent jurisdiction to prosecute violations under the GCA and MCA,[72] which Public Law 280 previously had divested of the federal government. After consultation and consent by the attorney general, the federal government must accept the concurrent jurisdiction.[73] In such cases, criminal jurisdiction will be layered with concurrent federal, state and tribal jurisdiction for most offenses.

What Public Law 280 did not grant is equally significant. Courts have held that the state and local law enforcement does not have the authority to enforce local ordinances; only laws of statewide application apply. Additionally, only those criminal laws that, as a matter of public policy, *prohibit* conduct are the subject of enforcement by the state. The latter proposition derives from the Supreme Court's analysis of a companion grant in Public Law 280 that provides for jurisdiction in state courts for civil disputes in Indian country and which generally allows that the rules of decision relating to such civil adjudication apply. As a result of the decisions in *Bryan v. Itasca County*[74] and *California v. Cabazon Band of Mission Indians*,[75] the Supreme Court has distinguished laws that are "criminal-prohibitory," and enforceable by states in Indian country under Public Law 280, and those that are "civil-regulatory," not enforceable by states in Indian country under Public Law 280. The standard for distinguishing between these two was stated by the Court as follows:

> [I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil regulatory and Pub. L. 280 does not

70 25 U.S.C. § 1323.
71 *See Walker v. Rushing*, 898 F.2d 672, 675 (8th Cir. 1990).
72 Public Law 111-211, § 221(a); codified at 25 U.S.C. 1321(a)(2).
73 *Id*.
74 426 U.S. 373 (1976).
75 480 U.S. 202 (1987).

> authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State's public policy.[76]

In those cases where a state has "decriminalized" conduct, as for lesser traffic offenses, they may be defined or construed to be civil-regulatory, and thus, not enforceable by state officials.[77]

Civil Jurisdiction

There are several key elements of the complex and nuanced civil regulatory and adjudicatory jurisdiction in Indian country, including those relating to the application of tribal jurisdiction to non-Indians on non-Indian land within Indian country, and the doctrine of Indian preemption of state jurisdiction.

Drawing upon the principles articulated in *Oliphant v. Suquamish Indian Tribe*[78] relating to the lack of inherent tribal criminal jurisdiction over non-Indians, the Supreme Court in *Montana v. United States*[79] established a presumption against tribal regulatory authority over nonmembers, which includes not only non-Indians, but also Indians who are not members of the tribe concerned.[80] The presumption is rebuttable, however, under two exceptions: (1) where the nonmember enters consensual relationships with the tribe or its members, such as in commercial dealings, contracts, leases, or other arrangements; and (2) when the conduct of the nonmember threatens or has some direct effect "on the political integrity, the economic security, or the health or welfare of the tribe."[81] In such cases, the tribe may retain inherent power to exercise civil authority over the conduct of nonmembers, including non-Indians on fee lands within its reservation.

The *Montana* case and its exceptions have been further clarified in subsequent Supreme Court jurisprudence. The court has upheld the imposition of a tribal severance tax on production from reservation trust lands by oil and gas companies doing business with the tribe.[82] As for a state's zoning authority, a Court plurality concluded that a tribal government lacked zoning regulation over

76 *Id*. at 209.

77 *See, e.g., Confederated Tribes of Colville Reserv. v. Washington*, 938 F.2d 146, 148–49 (9th Cir. 1991).

78 435 U.S. 191 (1978) (citing *Oliphant* for "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.")

79 450 U.S. 544 (1981).

80 *Id*. at 565.

81 *Id*. at 565-566.

82 *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982).

nonmember-owned lands,[83] but the decision includes multiple concurring and dissenting opinions. In 1997, the Court, in *Strate v. A-1 Contractors*,[84] examined the reach of tribal adjudicatory jurisdiction to a traffic accident and tort claim on a public highway right-of-way in the reservation, and the Court applied the *Montana* exceptions. The Court found the injured party was not in a contractual relationship with the tribe, and thus, the first *Montana* exception did not apply. Nor did the second exception apply, as opening the Tribal Court for the plaintiff was "not necessary to protect tribal self-government," nor was it "crucial to 'the political integrity, the economic security, or the health or welfare of the [tribes]."[85] In another case, a unanimous Court invalidated a tribe's hotel occupancy tax imposed on guests of a nonmember business located on fee lands inside the tribe's reservation.[86]

The Court also rejected tribal court jurisdiction for civil rights liability against a state game official who in good faith made a seizure on-reservation of a mounted big-game sheep head that was believed to have been shot unlawfully off-reservation.[87] Importantly, in that decision the Court found that the character of the Indian land was not dispositive to the outcome, and it essentially collapsed the *Montana* inquiry into the single question: whether regulatory jurisdiction over state officers was "necessary to protect tribal self-government or to control internal relations." The Court's holding that it was not reaffirms the Court's view that the tribe's adjudicatory jurisdiction follows its regulatory jurisdiction, or in this case, lack of it.

As for the exercise of state authority in Indian country, a doctrine of Indian preemption has developed. The Supreme Court articulated it most authoritatively in *White Mountain Apache Tribe v. Bracker.*[88] Relying on Congress' authority under the Indian Commerce Clause and the "semi-independent position" of the Indian tribes, the Court established a presumption that the state's authority is displaced as the general rule. As to the activities of Indians on the reservation, the presumption against state regulation is at its strongest. However, the validity of state regulation relating to the activity of nonmembers on the reservation calls for a fact-specific "particularized inquiry into the nature of the state, federal, and

83 *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989).
84 520 U.S. 438 (1997).
85 *Id.* at 459.
86 *Atkinson Trading Co. v. Shirley,* 532 U.S. 645 (2001).
87 *Nevada v. Hicks*, 533 U.S. 353 (2001).
88 448 U.S. 136 (1980).

tribal interests at stake[.]"[89] At the other end of the spectrum, where state regulation goes to non-Indians and nonmembers for activities not involving the tribe or its members, *Bracker*'s particularized inquiry standard should not apply.[90]

Taxation

In matters of taxation, the Supreme Court has held that Indian tribes have inherent authority to impose taxes within their jurisdiction, including the power to tax nonmember cigarette purchases from tribal vendors occurring on the reservation.[91] The Court has acknowledged that the power to tax is an essential attribute of Indian sovereignty as a necessary instrument of self-government and territorial management, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services.[92]

As for the imposition of state taxes in Indian country, the above-noted principles of Indian preemption apply. Generally speaking, the laws of a state have little force within the territory of an Indian tribe, and the states have limited power to tax on-reservation activity or property.[93] However, the Court has permitted state tax laws to apply to certain transactions involving nonmembers within the reservation, and where Congress has not prohibited it. This principle was articulated in *Washington v. Confederated Tribes of Colville Indian Reservation*, where the Court held that both the tribe and the state were entitled to levy tax on sales to nonmembers, in that case, the sale of cigarettes to nonmembers. However, any enforcement mechanism for the collection of taxes owing is problematic because of tribal sovereign immunity.[94]

Colville also instructs us that where revenues are derived from "value generated on the reservation" by activities involving the tribe, and where the taxpayer is the recipient of tribal services, state taxes may well be preempted. However, where there is no "value added" by the tribe and the tax is directed at off-reservation value, tribal sales to nonmembers without the imposition of state sales tax would impermissibly "market an exemption" from state taxes.

89 *Id.* at 145.

90 Specific factual settings should be examined in light of the standards that have developed around these unique principles of Indian law. The *American Indian Law Deskbook* provides an in-depth review of a variety of state regulation matters throughout the book, but particularly in chapters 5 and 6.

91 *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980).

92 *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 137 (1982).

93 *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164 (1973).

94 *See, e.g., Department of Taxation and Fin. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 71 (1994).

Indian Gaming

Probably no one topic in Indian law has garnered as much attention as gambling on Indian lands. The Indian Gaming Regulatory Act (IGRA)[95] was enacted by Congress in 1988 shortly after, and undoubtedly in response to, the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*.[96] In *Cabazon* the Court invalidated California's attempted regulation of Indian bingo on the ground that such regulation was civil rather than criminal in nature and therefore was not authorized by Public Law 280.

The Act was passed to provide "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments," but also to provide "a statutory basis for the regulation of gaming" adequate "to shield [tribal gaming] from organized crime and other corrupting influences to ensure that the Indian tribe is the primary beneficiary of the gaming operation."[97]

IGRA divides gaming into three categories with an intensifying level of regulatory oversight depending on the category of gaming. "Class I gaming" includes social games with prizes of minimal value, as well as traditional forms of Indian gaming, and is subject to exclusive regulation by Indian tribes.[98] "Class II gaming" includes bingo and bingo-related games and card games explicitly authorized by the state, but expressly excludes any banking card games or slot machines, and is subject to regulation by the tribe, with regulatory oversight by a federal government agency, the National Indian Gaming Commission (NIGC).[99]

"Class III" gaming is defined as all forms of gaming that "are not class I gaming or class II gaming"[100] and thus necessarily includes lotteries, parimutuel horse race wagering, banking card games, slot machines, and games typically found in casinos. Congress excluded "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind"[101] from the definition of a Class III gaming activity. Class III gaming is only lawful on Indian lands if three conditions are met: approval of a tribal ordinance or resolution by the governing body of the tribe and the Chairman of the NIGC; the activity must be located in a state that "permits such gaming for any purpose by any person, organization,

95 25 U.S.C. §§ 2501 *et seq*.
96 480 U.S. 202 (1987).
97 25 U.S.C. § 2702(1), (2).
98 25 U.S.C. §§ 2703(6).
99 25 U.S.C. §§ 2703(7), 2706(b).
100 25 U.S.C. § 2703(8).
101 25 U.S.C. § 2703(7)(B)(ii).

or entity;" and conducted in conformance with a Tribal-State compact that is approved by the Secretary of the Interior.[102]

Class III gaming requires a Tribal-State compact, an agreement that permits states and Indian tribes to develop joint regulatory schemes, and which may include provisions relating to the application of state criminal and civil laws, the allocation of jurisdiction between the state and the tribe necessary for the enforcement of gaming laws, and the assessment by the state of gaming activities in order to defray the costs of regulation.[103] Gaming revenues must be used for tribal governmental purposes, and the state may not demand revenues as a tax, fee or cost of permitting the class III gaming sought by the tribe.[104] The compacting process begins when a tribe requests negotiations with the state in which its lands are located,[105] which negotiations may be conducted by a governor, attorney general or gaming commission, depending upon state law.[106] IGRA provides jurisdiction in the federal courts to hear a claim by a tribe that a state has failed to negotiate in "good faith."[107]

If a court finds that a state failed to negotiate in good faith, IGRA permits the court to order the state and the tribe to conclude a compact within 60 days,[108] and if the parties are unable to agree to a compact, IGRA directs the parties to submit their "last best offer for a compact" to a court-appointed mediator who will then select one.[109] In determining whether a state negotiated in good faith, IGRA permits courts to "take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities."[110]

IGRA explicitly prohibits gaming on lands taken into trust for the benefit of a tribe after October 17, 1988.[111] This restriction does not apply, however, if the Secretary of Interior, having consulted with tribal and state and local officials, determines that gaming on the newly acquired lands would benefit the tribe and "would not be detrimental to the surrounding community," and the governor of

102 25 U.S.C. § 2710(d)(1).
103 25 U.S.C. § 2710(d)(3)(C).
104 25 U.S.C. § 2710(b)((2)(B), 2710(d)(4).
105 25 U.S.C. § 2710(d)(3)(A).
106 *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997).
107 25 U.S.C. § 2710(d)(7)(A).
108 25 U.S.C. § 2710(d)(7)(B)(iii).
109 25 U.S.C. § 2710(d)(7)(B)(iv).
110 25 U.S.C. § 2710(d)(7)(B)(iv).
111 25 U.S.C. § 2719(a).

the state concurs in the determination.[112] This is frequently called the "two-part determination." The restriction also does not apply when the lands acquired are taken into trust as part of (1) a settlement of a land claim; (2) the initial reservation of an Indian tribe acknowledged by the Secretary under the federal acknowledgment process; or (3) the restoration of lands for an Indian tribe that is restored to federal recognition.[113]

IGRA's implementation has spawned often contentious litigation. The first disagreement occurred due to opposing views of the "scope of gaming" that was to be the subject of Class III compact negotiations and charges of "bad faith" leveled against states by tribes. In 1991, one federal district court held that by permitting a state-run lottery and legal dog track betting, both Class III activities, Wisconsin, in fact, "permitted" other Class III activities for IGRA purposes,[114] and it would be a lack of good faith for a state to refuse to negotiate for other Class III activities. Tribes nationwide pressured states to negotiate for slot machines where states arguably did not "permit" them, but allowed other forms of Class III gambling. Ultimately, a majority of federal appeals courts held that the scope of gaming for Class III negotiations was "game-specific," and that IGRA does not require a state to negotiate over one form of Class III gaming activity "simply because it has legalized another, albeit similar form of gaming."[115] Accordingly, a state "need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have."[116]

In the course of "lack of good faith," or "bad faith" litigation, certain states pressed their Eleventh Amendment immunity from suit in federal court, taking the matter to the U.S. Supreme Court. In a case more about federalism than Indian gaming, the high court in a landmark case, *Seminole Tribe v. Florida*,[117] overturned earlier precedent and ruled that no Article I power of Congress in the United States Constitution, including the Interstate Commerce Clause or the Indian Commerce Clause, may serve to abrogate a state's sovereign immunity from suit in federal court. The Court further denied to the tribe the availability of an *Ex parte Young*[118] remedy against a state officer, as IGRA, in the Court's

112 25 U.S.C. § 2719(b)(1)(A).

113 25 U.S.C. § 2719(b)(1)(B).

114 *Lac du Flambeau Band v. Wisconsin,* 770 F. Supp. 480, 486-87 (W.D. Wis. 1991).

115 *Rumsey Indian Rancheria of Wintun Indians v. Wilson,* 64 F.3d 1250, 1255, 1258 (9th Cir.1994), *amended by* 99 F.3d 321 (9th Cir.1996); *see also Cheyenne River Sioux Tribe v. South Dakota,* 3 F.3d 273 (8th Cir.1993).

116 *Ibid.*

117 517 U.S. 44 (1996).

118 209 U.S. 123 (1908).

view, already provided a "detailed remedial scheme."[119] The Secretary of Interior, recognizing a loss of leverage for tribes where a state obtained a dismissal of a bad faith lawsuit on Eleventh Amendment grounds, provided a "*Seminole*-bypass" regulation allowing the Secretary to provide for Class III procedures in lieu of a compact in the event of such a dismissal.[120] Notwithstanding *Seminole*, several states consented to federal court jurisdiction in bad faith lawsuits brought by tribes.

Other key litigation has revolved around the ability of a state to permit "Indian-only" casino gaming, thereby allowing the tribes to have what no one else in the state is permitted;[121] the validity of "revenue-sharing" by the tribe with the state;[122] whether tribes can use slot machine-like devices for the play of Class II bingo and bingo-related games;[123] and what constitutes a "restored tribe" and "restored lands" for the purposes of IGRA's exception to the prohibition on gaming on post-1988-acquired lands in trust.[124]

With respect to revenue sharing, the Secretary of the Interior, through letters and memoranda, has indicated no opposition to the approval of compacts that provide for the sharing of gaming revenues with state governments as long as there is an arms-length agreement without elements of coercion and, most importantly, a *quid pro quo*, offering in the compact something for the tribe it could not otherwise reasonably have obtained. Examples include a promise by the state of the exclusivity of tribal gaming activities in a geographic region, lifting of restrictions on the numbers of slot machines for use in a tribal casino, or other tangible benefits for the tribe. Where a state has by constitution or statute provided for Indian-only gaming within the state's borders, there may be no grounds to provide "exclusivity" in negotiations for a share of tribal gaming revenue, given that the state already has provided that exclusivity by law and cannot thereby

119 *Seminole, supra,* 517 U.S. at 74.

120 25 C.F.R. § 291.1. *But see Texas v. United States,* 497 F.3d 491 (5th Cir. 2007) (the court found the regulations invalid).

121 *E.g., Artichoke Joe's v. Norton,* 216 F. Supp.2d 1084, 1092 (2002), *aff'd* 353 F. 3d 712 (9th Cir. 2003); *cert. den.*, 543 U.S. 815 (2004).

122 *See, e.g., In re Indian Gaming Related Cases*, 331 F.3d 1094 (2003), *cert. den.,* 540 U.S. 1179 (2004).

123 *See, e.g., United States v. Santee Sioux Tribe of Nebraska*, 324 F.3d 607 (8th Cir. 2003), *cert. den.*, 540 U.S. 1229 (2004); *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019 (2003), *cert. den.,* 540 U.S. 1218 (2004); *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713 (10th Cir. 2000); *United States v. 103 Elec. Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000); and cases cited therein.

124 *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Att'y*, 369 F.3d 960 (2004).

offer it as a "meaningful concession" in bargaining.[125] When a governor or attorney general is presented with a request for negotiations or becomes aware of the acquisition of land within the state that may be used for gaming under IGRA, the attorney general must carefully assess the state's obligations in this increasingly complex and developing legal field.

Sovereign Immunity and the Indian Civil Rights Act

Attorneys general are presented with unique difficulties in dealing with Indian tribes in part because tribal governments enjoy a comprehensive immunity from suit in all judicial fora. As "domestic dependent nations,"[126] Indian tribes have certain retained inherent powers of self-government, and among these is their common-law immunity from unconsented suit in any court against all but the federal government.[127] As a matter of federal law, a tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.[128]

Tribal officers or agents, however, may not enjoy the immunity possessed by tribes.[129] Even off-reservation activity of a tribal government is afforded the immunity of the tribe from suit in court.[130] In an enforcement of contracts context, the Supreme Court rejected the notion that the immunity is confined to transactions on reservations and to tribal governmental activities,[131] relying on its earlier ruling that a tribe enjoys immunity from a suit to collect unpaid state taxes.[132] In *Kiowa*, the Court noted that Congress, subject to constitutional limitations, can alter the limits of tribal sovereign immunity through explicit

125 *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010) (holding, in part, the demand for a share of gaming revenues for use in the state's general fund was an impermissible demand for a tax or fee).

126 *Cherokee Nation*, 30 U.S. (5 Pet.) 1, 16 (1831).

127 *United States v. United States Fidelity & Guaranty Co.,* 309 U.S. 506 (1940); *also, EEOC v. Karuk Tribe Housing Auth.,* 260 F.3d 1071, 1075 (9th Cir. 2001); *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 382 (8th Cir. 1987), *cert. den*. 485 U.S. 935 (1988).

128 *See, e.g., Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890 (1986).

129 *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991).

130 *Puyallup Tribe, supra*; *Kiowa Tribe v. Manufacturing Technologies., Inc.*, 523 U.S. 751, 757-58 (1998).

131 *Kiowa Tribe, supra*, 523 U.S. at 755.

132 *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.,* 498 U.S. 505, 510 (1991).

legislation, and "has always been at liberty to dispense with such tribal immunity or to limit it[,]" but has "not yet done so."[133]

Tribes are not parties to the United States Constitution and derive no power or obligations directly from it.[134] Accordingly, tribal governments are not bound by the Bill of Rights to afford certain constitutional protections to their members. In recognition of this fact, Congress enacted the Indian Civil Rights Act (ICRA) in 1968.[135] In ICRA, Congress imposed some, but not all, Bill of Rights obligations upon tribes when exercising their powers of self-government.[136] It applied virtually all of the articles in the Bill of Rights to tribal governments as a matter of statute. Among the provisions absent from ICRA are "the Establishment Clause, the right to jury trial in civil cases, and the right of indigents to appointed counsel in criminal cases."[137] ICRA provides but one remedy in federal courts: the writ of habeas corpus "to test the legality of [a petitioner's] detention by order of an Indian tribe,"[138] and the Supreme Court has upheld the exclusive nature of the remedy.[139]

In amendments to ICRA, the Congress effectively overturned the Supreme Court's decision in *Duro v. Reina,*[140] that tribes lack inherent authority to prosecute nonmember Indians for offenses committed against members.[141] Congress expressed its view that Indian tribes could exercise criminal jurisdiction over nonmember Indians.[142] In *United States v. Lara*,[143] the Court upheld the amendments as seeking "to adjust the tribes' status" by "relax[ing] the restrictions, recognized in *Duro*, that the political branches had imposed on the tribes' exercise

133 *Id.* at 759.

134 *E.g., Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 268-69 (1997); *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 782 (1991).

135 Pub. L. No. 90-284, §§ 201–701, 82 Stat. 73, 77–81 (1968) (codified as amended at 25 U.S.C. §§ 1301–1303, 1321–1326, 1331, 1341).

136 25 U.S.C. § 1301(1).

137 *See United States v. Bryant*, 136 S. Ct. 1954, 1964-66 (Sixth Amendment right to counsel does not apply to tribal-court proceedings. If defendant's tribal court convictions complied with ICRA, they could be used to enhance the sentence for a subsequent conviction pursuant to 18 U.S.C.A. § 117(a)); *Duro v. Reina*, 495 U.S. 676, 693 (1990); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62–63 (1978).

138 25 U.S.C. § 1303.

139 *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

140 495 U.S. 676 (1990).

141 *Duro, supra*, at 685-86.

142 Pub. L. No. 101-511, § 8077, 104 Stat. 1856, 1892–93 (1990), & Pub. L. No. 102-137, § 1, 105 Stat. 646 (1991); codified at 25 U.S.C. § 1301(4).

143 541 U.S. 193 (2004).

of inherent prosecutorial power."[144] Consequently, while *Lara* raises many questions, it appears that Congress has leeway to adjust the bounds of tribal authority as a matter of federal common law.

Indian Child Welfare Act

Congress, in the Indian Child Welfare Act of 1978 (ICWA),[145] divided up rights and obligations between Indian tribes and states in matters relating to the custody of Indian children. It did so in response to what was viewed as "[t]he wholesale separation of Indian children from their families" in state court voluntary or involuntary termination of parental rights proceedings. Congress provided various procedural and substantive requirements to address the perceived problem, including the preferred use of tribal courts and the imposition of strict standards for state courts when dealing with a child welfare matter involving an Indian child. By its terms, ICWA applies to any "child custody proceeding" which a state court knows, or has reason to know, involves an "Indian child."[146] A "child custody proceeding" may include proceedings involving foster care placement, termination of parental rights, pre-adoptive or temporary placement, and adoptive placement.[147] ICWA relies heavily on the residence or domicile of the Indian child in determining jurisdiction over the proceedings. The statute provides that an Indian tribe shall have jurisdiction exclusive as to any state over any child custody proceeding involving an Indian child *who resides or is domiciled* within the reservation of the tribe.[148]

As for a child not domiciled or residing within the reservation, upon request of either parent, the child's Indian custodian or the tribe, the state court is obliged to transfer the case to the Indian tribe, subject to declination by the tribe,[149] and in most such cases, the Indian custodian and the Indian child's tribe has a right to intervene in the state court proceeding.[150] Different procedural requirements may apply to different proceedings, requiring careful attention to the type, sequence and manner of action involved.[151]

144 *Id.* at 200.

145 Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901-1963).

146 25 U.S.C. §§ 1903(1), (4); 1912(a).

147 25 U.S.C. § 1903(1).

148 25 U.S.C. § 1911(a).

149 25 U.S.C. § 1911(b).

150 *Id.*

151 The Department of the Interior issued regulations and guidelines on the application of ICWA in 2016. *See* Indian Child Welfare Act Proceedings, Final Rule, 81 Fed. Reg. 38,778 (Jun. 14, 2016), codified at 25 C.F.R. part 23 and 81 Fed. Reg. 96,476 (Dec. 30, 2016). Chapter 13 of the 2017

Indian Reserved Water Rights

Another unique feature of Indian law includes the special rules developed to provide for and protect water rights for tribal governments, particularly when such rights are not expressly provided for in treaty or statute establishing a reservation. Courts have found an implied federal water right sufficient to fulfill the purposes of the reservation, called a "federal reserved right" or "*Winters* right," after the United States Supreme Court decision in *Winters v. United States*.[152] Unlike state-based prior appropriation rights,[153] the priority of federal reserved rights is the reservation's creation date,[154] and they are not subject to reduction in times of shortage, nor to forfeiture or abandonment for non-use.[155] In fact, they do not arise from use, actual or beneficial, at all, but from the tribal ownership of the land. The rights are reserved to carry out the purposes for which each reservation was established, typically for agriculture, as was the case in *Winters*.[156]

In *Arizona v. California* (*Arizona* I),[157] the Supreme Court set forth a method for quantifying federal reserved rights. The Court noted the implied rights are guaranteed regardless of how the reservation was established and whether the reservation was pre- or post-statehood.[158] The Court rejected a quantification based on the "reasonably foreseeable needs" of the tribe or "equitable apportionment," and adopted the principle that, depending on the treaties, statutes or executive orders underlying the implied rights, the principal measure should be based on the number of acres in irrigation, called the "practically irrigable acreage" standard.[159]

Western states typically have adjudicatory mechanisms in place for the allocation of appropriative and other water rights, including in some cases, groundwater rights, but historically had no jurisdiction to compel tribes or the federal government to appear in such adjudications. In 1952, Congress enacted the McCarran Amendment, which subjected tribes and the federal government

Edition of the *Deskbook* will provide extensive commentary on the new rules and guidelines.

152 207 U.S. 564 (1908).

153 Prior appropriation rights are generally understood to be on a first-in-time, first-in-right basis, with a guarantee in times of shortage that a senior appropriator obtains his rights to water over junior appropriators. *See Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 805 (1976).

154 *Arizona v. California*, 373 U.S. 546, 600 (1963) (*Arizona* I).

155 *E.g., In re General Adjudication of All Rights to Use of Water in Gila River System and Source*, 35 P.3d 68, 72 (Ariz. 2001)("*Gila* V").

156 207 U.S. at 576.

157 373 U.S. 546 (1963), *decree entered*, 376 U.S. 340 (1964).

158 *Id*. at 577, 598.

159 *Arizona v. California, supra,* 373 U.S. at 600-601.

to state adjudication of water rights and their subsequent administration.[160] The sovereign immunity of tribes and the federal government are waived to the extent that their rights are at issue.[161] State court adjudication may not be barred by disclaimer clauses in the states' enabling statutes.[162]

Hunting and Fishing Rights

In addition to the right of occupancy, Indian title to land generally incorporates the right to engage in hunting, fishing and gathering activities.[163] When these rights accompany lands reserved or granted by treaty, they cannot be taken away without compensation.[164] As with other treaty language, rights reserved for hunting, fishing and gathering are construed in accordance with the Indian canons of construction, which recognize the imbalance of power and potential for miscommunication when treaties were negotiated, and thus, generally favor the tribes' interpretation.[165] Distinctions are to be made between on-reservation rights and off-reservation rights preserved by treaty. On-reservation rights are viewed as "exclusive," and are subject to tribal regulation and no state interference. A strictly limited role for states is allowed only in rare cases, such as where on-reservation lands have been alienated in fee to non-Indians,[166] or in "exceptional circumstances," where the state has an interest in "conserving a scarce, common resource."[167] Public Law 280 specifically exempts reserved hunting from the exercise of a state's criminal jurisdiction. There has been contentious litigation between states, tribes and the federal government as to rights asserted under treaties that guaranteed the taking of fish at "usual and accustomed grounds" stations, or places, with the privilege of hunting and gathering "on open and unclaimed lands,"[168]

In 1970, the United States, joined by tribal intervenors, filed a lawsuit against Washington state concerning salmon runs that pass through the "usual

160 43 U.S.C. § 666.

161 *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 566 n. 17 (1983).

162 *See, e.g., United States v. Super. Ct. in and for Maricopa County*, 697 P.2d 658 (Ariz. 1985).

163 *United States v. Winans*, 198 U.S. 371 (1905).

164 *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968).

165 *See, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

166 *See, e.g., Montana v. United States*, 450 U.S. 544, 560 (1981); *South Dakota v. Bourland*, 508 U.S. 679 (1993).

167 *Puyallup Tribe v. Dep't. of Game*, 443 U.S. 165 (1977).

168 *E.g.,* Treaty with the Nisquallys, 10 Stat. 1132 (1855); Treaty of Point Elliott, 12 Stat. 927 (1855).

and accustomed grounds and stations" of treaty Indian tribes in western Washington, where the treaties secured a right of taking fish "in common with" citizens. In "Phase I" of what has become known as the "*Boldt* decision,"[169] the district court examined the extent to which the treaties entitled the tribes to a specific volume of fish and to preempt state regulation of fishing. The court adopted a "fair share" approach, allowing both non-Indian and tribal off-reservation fishing to obtain a fair share of the salmon. It held that equal shares are fair shares, and enjoined Washington from regulating the fisheries in a manner that would deprive the tribes of up to one-half of the salmon,[170] which half would provide for both the tribes' commercial and subsistence and ceremonial needs. The U.S. Supreme Court upheld the fair share approach,[171] but added that "a livelihood—that is to say, a moderate living"—defines the maximum tribal share.[172]

"Phase II" of the Washington litigation, concerning whether the state has an obligation to preserve fish habitat from pollution, obstruction of streams or other impediments so as to avoid impairment of the treaty right, is still pending. After procedurally complex litigation at district and appeals court levels, the matter has stood open for a "concrete set of facts" to arise.[173] The general rule is that the state may not qualify the tribes' right to fish, but the state may exercise some neutral regulation in the interest of conservation that does not discriminate against the tribes.[174]

Environmental Regulation

Tribes may exercise their inherent authority to protect the environment, through standards, permitting and penalties for violations with enforcement in tribal courts. They may also exercise powers authorized by Congress, including as primary regulators under federal statues. The Clean Water Act,[175] the Safe Drinking Water Act,[176] and the Clean Air Act,[177] all authorize tribes to be treated

169 *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

170 *Id*. at 343-44, 408, 416.

171 *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 670, 684-85 (1979).

172 443 U.S. at 685-87 & n.27.

173 *United States v. Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985) (*en banc*), *cert. den.,* 474 U.S. 994 (1985).

174 *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392, 398 (1968).

175 33 U.S.C. § 1251 *et seq*.

176 42 U.S.C. § 300f *et seq*.

177 42 U.S.C. § 7601(d).

as states by the Environmental Protection Agency (EPA). Generally speaking all federal environmental statutes, as statutes of general applicability, apply in Indian country unless they interfere with tribal self-government or conflict with other treaty or statutory rights. Transportation of hazardous materials, storage of nuclear waste materials, pesticide regulation, hazardous substance and oil spills, environmental damages, remediation and enforcement mechanisms are environmental matters that may arise in Indian country.

Tribal Cultural Resources

There are specific federal statutory protections of unique tribal cultural resources and especially human remains. Cultural property may include intellectual property, trademarks, patents and other artistic, religious or similar items that are important to a tribe's traditions and customs.

The principal federal statute of concern is the Native American Graves Protection and Repatriation Act (NAGPRA).[178] Applicable to Indian tribes, Alaska Natives and Native Hawaiian organizations, it establishes rights for repatriation of human remains and cultural and sacred objects that are housed in federal institutions or museums or museums that are federally funded. Additionally, these items are protected from excavation and removal from federal or tribal lands, with criminal penalties attached to trafficking in human remains and cultural items. NAGPRA provides an elaborate regime for the determination of the appropriate custody of human remains and cultural items that are returned or inadvertently discovered.

State-Tribal Cooperative Agreements

In areas such as air and water pollution, treatment of hazardous wastes, and resource conservation, tribes and states can develop agreements or memoranda of understanding. Some of the most successful of these agreements are deputization or cross-deputization agreements empowering law enforcement personnel of one government to enforce laws in the other's jurisdiction.[179]

It is helpful for states to adopt executive orders or legislation enabling the entry into such agreements.[180] In Alaska, for example, the state and over sixty

178 18 U.S.C. § 1170, 25 U.S.C. §§ 3001-3013.

179 The American Indian Law Deskbook, chapter 14, provides examples of such agreements.

180 *See, e.g.,* Or. Rev. Stat. §§ 182.162-182.168.

of the 229 federally recognized tribes in Alaska entered into a unique arrangement known as the Millennium Agreement, which provides "a framework for the establishment of lasting government-to-government relationships." Such frameworks may allow for periodic meet-and-confer sessions and the development of protocols and agreements on specific matters. Both state and tribal authority to enter into such agreements must be analyzed, but even if such authority may be implied under state and tribal law, it is advisable to have appropriate enabling legislation for both parties.

Federal approval of a tribal-state agreement is generally not required as long as the agreement does not involve tribal lands or trust property[181] such as sales, leases or conveyances of Indian land or property. Questions may always be presented to the Secretary of the Interior for an opinion. Tribal-state agreements serve the additional salutary effect of improved tribal-state relations, allowing for increased contact for dispute resolution without litigation and the furtherance of mutual governmental interests.[182] State attorneys general can play a key role in facilitating the appropriate contact, developing the necessary legal and procedural constructs for such agreements and in executing such agreements on behalf of the state.

181 *See* 25 U.S.C. § 81; § 177.

182 *See* National Conference of State Legislatures, Government to Government Models of Cooperation Between States and Tribes (April 2009). The manual provides guiding principles in state-tribal relations, outlines state legislative and tribal government roles, and multiple models for agreements and protocols.