

Brigham Young University Journal of Public Law

Volume 19 | Issue 1

Article 2

3-1-2004

The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians

Robert McCarthy

Follow this and additional works at: <https://digitalcommons.law.byu.edu/jpl>

 Part of the [Indian and Aboriginal Law Commons](#)

Recommended Citation

Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. Pub. L. 1 (2004).
Available at: <https://digitalcommons.law.byu.edu/jpl/vol19/iss1/2>

This Article is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Brigham Young University Journal of Public Law by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians

*Robert McCarthy**

TABLE OF CONTENTS

<i>I. Introduction</i>	
A. BIA: Bossing Indians Around	4
B. Bashing the BIA	5
C. Defending the BIA	8
D. Reforming the BIA	10
E. Understanding the BIA	14
<i>II. The BIA and the Federal Trust Obligation to American Indians</i>	
A. The BIA and the Department of the Interior	15
B. Statutory and Regulatory Authorities	18
C. Enforcement of the Federal Trust Responsibility	19
<i>III. BIA Decision-Making, Records and Appeals</i>	
A. Administrative Appeals	25
B. BIA Records	31
C. APA Review	33
<i>IV. Tribal Government</i>	
A. Federal Recognition of Indian Tribes	34
B. Tribal Constitutions	38
C. Tribal Resolutions and Elections	39
D. Tribal Membership	40
E. The Politics of Tribal Recognition	43

* Robert McCarthy, J.D. University of Montana (1988), B.A. Carroll College (1976), member State Bars of Montana, Idaho, Oregon, Washington, Oklahoma. Mr. McCarthy has been associated with Indian legal services programs in each of these states, and directed Indian law clinical education programs at the University of Idaho College of Law and University of Washington Law School. Mr. McCarthy currently serves as Field Solicitor for the United States Department of the Interior in Palm Springs, California, where he is an adjunct professor at the Desert College of Law. Views expressed in this article are those of Mr. McCarthy and do not represent the opinion of the United States Department of the Interior or the Office of the Solicitor. No confidential communications or client confidences have been released in this Article.

V. <i>Law and Order in Indian Country</i>	
A. Tribal Jurisdiction	45
B. Courts of Indian Offenses	49
C. Law Enforcement	52
D. Unequal Justice	56
VI. <i>Indian Land and Water</i>	
A. Acquisition of Indian Lands	57
B. Selling or Leasing Indian Lands	62
C. Agricultural Lease Regulations	67
D. Residential and Business Lease Regulations	70
E. Grazing Permits	75
F. Indian Forest Lands	76
G. Restricted Lands Held by Members of the Five Civilized Tribes	77
H. Alaska Native Landholding	78
I. Navajo and Hopi Relocation	80
J. Easements, Rights of Way, and Indian Roads	80
K. Indian Irrigation Projects	83
L. Indian Water Rights	84
M. Federal Landlord	85
VII. <i>Indian Energy and Minerals</i>	
A. Indian Mineral Leasing Act	86
B. IMLA Regulations	87
C. Indian Mineral Development Act	90
D. Conflicts of Interest	90
VIII. <i>Indian Probate</i>	
A. Indian Wills and Probate	91
B. Probate Reform	96
IX. <i>Fish and Wildlife</i>	
A. Reserved Rights	99
B. Tribal Management	100
C. Tribal Consultation	101
D. A Question of Priorities	101
X. <i>Indian Gaming</i>	
A. The Indian Gaming Regulatory Act	103
B. The Impact of Indian Gaming	105

1]	BUREAU OF INDIAN AFFAIRS	3
<i>XI. Tribal Economic Development</i>		
A.	Regulating Commerce with the Indians	108
B.	BIA Loans	109
C.	Department of Commerce	110
D.	Revenue Bonds	110
E.	Tribal Contracts	111
F.	IRA Corporations	111
G.	Employment and Labor Laws	112
H.	Unequal Development	113
<i>XII. Indian Heritage Preservation</i>		
A.	Archaeological Resources Protection Act	114
B.	Native American Graves Protection and Repatriation Act	114
C.	American Indian Religious Freedom Act	116
D.	Indian Arts and Crafts	117
<i>XIII. Human and Health Services</i>		
A.	Social Services	118
B.	Health Care	120
C.	Administration for Native Americans	122
D.	“A Quiet Crisis”	123
<i>XIV. Housing</i>		
A.	BIA’s Housing Improvement Program	125
B.	HUD & NAHASDA	125
C.	Promises Unkept	126
<i>XV. Education</i>		
A.	“A National Tragedy”	127
B.	The Self-Determination Era	128
C.	BIA’s Office of Indian Education	129
D.	Failing Grades	132
<i>XVI. Self-Determination and Self-Governance</i>		
A.	Indian Self-Determination	133
B.	Tribal Self-Governance	135
C.	Contractor Tort Liability	137
D.	Self-Governance and the Trust Responsibility	138
<i>XVII. Trust Fund Management and Reform</i>		
A.	Trust Funds Management	141
B.	Trust Fund Reform	143
C.	<i>Cobell</i>	144

D. Tribal Trust Funds	151
<i>XVIII. BIA Reorganization</i>	
A. “As-Is/To-Be”	152
B. Tribes Oppose Stripping the BIA of Trust Responsibilities	153
C. BIA & OTFM: “Internecine Warfare”	158
<i>XIX. Conclusion</i>	

I. INTRODUCTION

A. BIA: Bossing Indians Around

Congress formally established the Bureau of Indian Affairs (BIA) in the Department of War in 1834,¹ ostensibly to assist Indians, but also to subjugate and in some cases to exterminate them.² Transferred to the newly created Department of the Interior in 1849,³ the BIA oversaw gradual but dramatic shifts in federal Indian policy,⁴ including the end of the Treaty Era in 1871.⁵ The nineteenth century movement of tribes onto

1. Act of June 30, 1834, Ch. 162, 4 Stat. 735 (codified in part as amended at 25 U.S.C. §§ 9, 40, 45, 48, 60, 62, 68). The origins of the Indian Service in the War Department far preceded this statute, however. See e.g., Act of August 7, 1789, Ch. 7, 1 Stat. 49 (creating the Department of War, with responsibilities including those as assigned by the President, “relative to Indian affairs.”). The Bureau of Indian Affairs itself is typically said to date from 1824, when the War Department, without Congressional authorization, created an Office of Indian Affairs. See, e.g., HOUSE RPT. NO. 108-542, at 68.

2. See, e.g., Kevin Gover, (former) Assistant Secretary–Indian Affairs, *Remarks at the Ceremony Acknowledging the 175th Anniversary of the Establishment of the Bureau of Indian Affairs* (Sept. 8, 2000) reprinted in 25 AM. INDIAN L. REV. 161, 161-62 (2000-2001). In acknowledging the historic roots of the Agency, Gover cited, among other things, BIA’s historic complicity in

[T]he deliberate spread of disease, the decimation of the mighty bison herds, the use of the poison alcohol to destroy mind and body, and the cowardly killing of women and children . . . [And] acts so terrible that they infect, diminish, and destroy the lives of Indian people decades later, generations later.

3. Act of March 3, 1849, Ch. 108, §§ 1, 5, 9 Stat. 395.

4. See generally, F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 117 (1982) [hereinafter COHEN]; CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 8-9 (Yale University Press 1987). Indian law is also the subject of an excellent “Nutshell.” WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL (West, 4th ed. 2004). Regarding the history of the BIA, see COHEN, at 108-09, 117-21, 673-75. Archival Records of the Bureau of Indian Affairs may be found at the National Archives and Records Administration in Washington, D.C., Record Group 75. See http://www.lexisnexis.com/academic/guides/native_american/bia.asp (Records of the Bureau of Indian Affairs, Central Classified Files, 1907-1939). See also Edward E. Hill, Preliminary Inventory of the Records of the Bureau of Indian Affairs, PI 163, Washington, DC: National Archives and Records Service, GSA (1965).

5. The Appropriations Act of March 3, 1871, put an end to treaty making between the federal government and the tribes, but upheld the obligation of existing treaties. 16 Stat. 544, 566

Indian Reservations was followed by the breaking up of tribal land holdings and distribution of individual allotments to tribal members, with the “excess” lands becoming available for settlement by non-Indians.⁶

In 1928, a study known as the Meriam Report delivered a harsh indictment of federal Indian policy, and called for sweeping changes.⁷ There followed a period known as the “Indian New Deal,” the centerpiece of which was the Indian Reorganization Act of 1934,⁸ which put an end to allotment of tribal lands, and promoted the revitalization of tribal governments. This tribal renaissance was short-lived, however, as Congress declared in 1953 a goal of terminating the special status of Indian tribes and repudiation of the federal trust responsibility.⁹ By the 1970s, Congress had again changed course, opting to reject policies of assimilation and termination in favor of policies that promote tribal self-determination.¹⁰

Throughout the zigzag course of federal policy with respect to Indian affairs, administrative responsibility for those policies has rested primarily with the BIA, or its predecessor agency, principally under the direction of the Commissioner of Indian Affairs.¹¹

B. *Bashing the BIA*

Throughout its existence, the BIA may be the most maligned agency in the entire United States Government. The BIA has been vilified from all sides, adjudged “incapable” by a federal court,¹² condemned by

(current version at 25 U.S.C. § 71 (2000)).

6. General Allotment Act of 1887, 24 Stat. 388 (current version, as amended, at 25 U.S.C. § 331).

7. INSTITUTE FOR GOV'T RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (1928) [hereinafter MERIAM REPORT].

8. Indian Reorganization Act (Wheeler-Howard Act), ch. 576, 48 Stat. 984 (1934) (current version at 25 U.S.C. §§ 461-479 (2000)).

9. H. R. Con. Res. 108, 83rd Cong., 1st Sess., 67 Stat. B132 (1953).

10. *E.g.*, Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, 88 Stat. 2214 (current version at 25 U.S.C. § 458-458(e) (2000)).

11. The Act of July 9, 1832, first authorized the post of Commissioner of Indian Affairs. Ch. 174, 4 Stat. 564 (codified in part as amended at 25 U.S.C. §§ 1, 2, 8). Three statutes are often cited as authority for a wide range of BIA actions. “The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.” 25 U.S.C. § 2 (2000). “The President may prescribe such regulations as he may deem fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.” 25 U.S.C. § 9 (2000). “The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States . . .” 25 U.S.C. § 13 (2000).

12. *See, e.g.*, *Cobell v. Norton*, 226 F. Supp. 2d 1, 11 (D.D.C. 2002), *vacated by, in part, and remanded by* 334 F. 3d 1128 (D.C. Cir. 2003) (“The Department of Interior’s administration of the

members of Congress,¹³ deemed “incompetent” by a Presidential Commission,¹⁴ and eviscerated in countless editorials.¹⁵ On many reservations, tribal members wryly joke that the acronym stands for “Bossing Indians Around.” Perhaps the harshest criticism has come from the most unexpected source, when, in the year 2000, the agency’s head offered a moving apology for “the fact that the works of this agency have at various times profoundly harmed the communities it was meant to serve.”¹⁶

As the oldest federal agency in continuous existence, BIA has been the subject of criticism and proposals for its abolition almost since its birth.¹⁷ The Congressional Research Service reported to Congress in

Individual Indian Money (‘IIM’) trust has served as the gold standard for mismanagement by the federal government for more than a century.”); *see also id.* at 125 (“The Department of Interior is truly an embarrassment to the federal government in general and the executive branch in particular. The 300,000 individual Indian beneficiaries deserve a better trustee-delegate than the Secretary of Interior.”).

13. *E.g.*, “‘BIA seems to now stand for Bureaucratic Indecision Always,’ said Rep. J.D. Hayworth (R-Ariz.), the Republican co-chair of the Congressional Native American Caucus . . . Rep. Joe Baca (D-Ariz.) . . . said the agency’s initials should stand for ‘bureaucratic inaction.’” *House Panel Sympathetic to Tribes on Recognition*, ¶¶ 5-6 (Apr. 1, 2004), at <http://www.indianz.com/News/archive/000971.asp>. The website Indianz.Com is a comprehensive digest of news on current Native American issues, with links to relevant resources.

14. PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES, REPORT AND RECOMMENDATIONS TO THE PRESIDENT OF THE UNITED STATES, at 41-54 (1984) [hereinafter PRESIDENTIAL COMMISSION], reprinted in *Federal Government’s Relationship with American Indians: Hearings Before the Special Committee on Investigations of the Senate Select Committee on Indian Affairs*, 101st Cong. (Part 1) 277, 368-73 (1989) [hereinafter, *Special Committee on Investigations*].

15. *E.g.*, *DWI Morass Bolsters Call for BIA Revolution*, ALBUQUERQUE TRIBUNE, Apr. 20, 2004, at C2, (“The BIA is an agency in serious need of reform.”); *A Continuing Shame*, N.Y. TIMES, September 26, 2004, at 4-10, (attributing to the BIA “a century of disarray and dishonesty” in dealing with Indians); Mark Anthony Rolo, *Guest Opinion: BIA’s Top American Indian Official Should Go*, BILLINGS GAZETTE, June 25, 2004, available at <http://www.billingsgazette.com/index.php?display=rednews/2004/06/25/build/opinion/40-guest-op.inc> (charging the BIA with a “history of indifference to tribes”); *Settle a Shameful Case of Indian Trust Money*, SEATTLE TIMES, April 12, 2004, at B6, (calling BIA management “alternately inept and malicious”).

16. Gover, *supra* note 2, at 161.

17. In 1834, when Congress sought to reorganize the “Indian Department,” it noted that “[i]ts administration is expensive, inefficient, and irresponsible.” COHEN, *supra* note 4, at 117 (quoting H.R. Rep. No. 23-474 at 2-3 (1834)). Late into the nineteenth century, Congress debated transferring Indian affairs back to the War Department. *See also id.* at 119 (citing e.g., S. Rep. No. 39-156, 6 (1867) [PEACE COMMISSION]). “In the period from 1867 to 1887, the Bureau of Indian Affairs was noted for its corruption and cynicism, along with some honest efforts at reform.” Odie B. Faulk, *Book Review*, 2 AM. INDIAN L. REV. 535 (reviewing LORING BENSON PRIEST, UNCLE SAM’S STEPCHILDREN: THE REFORMATION OF UNITED STATES INDIAN POLICY, 1865-1887 (Octagon Books, 1972)). In 1869, an independent Board of Indian Commissioners was created to correct BIA mismanagement in the purchase and handling of Indian supplies. *See* COHEN, *supra* note 4, at 121 (citing Act of April 10, 1869, ch. 16, § 4, 16 Stat. 13, 40 (superceded by Executive Order No. 6145, May 25, 1933) (formerly codified at 25 U.S.C. § 23 (1928))). The Meriam Report criticized inefficient, paternalistic administration of Indian policy in 1928. *See* COHEN *id.* at 144. A Senate Report issued in 1943 castigated the BIA and called for a drastic reduction in its funds, staff and

1996 that there had been more than 1050 investigations, reports, commissions, and studies on BIA reorganization compiled since 1834.¹⁸ In recent decades, those calls for reform have been virtually continuous, and the criticism more strident.

A 1976 Report on BIA Management Practices to the American Indian Policy Review Commission (AIPRC) found “a notable absence of managerial and organizational capacity throughout the BIA.”¹⁹ The AIPRC Task Force on Federal Administration and Structure of Indian Affairs criticized in particular “Area Office staff [that] has been delegated too much authority by the Central Office and basically serves as a ‘bottle-neck’ designed and motivated to systematically undermine Indian self-development progress.”²⁰

The Presidential Commission on Indian Reservation Economies castigated the BIA in 1984 for “incompetent” management of trust assets; excessive regulations and “red tape;” “incompetent” technical assistance to tribes; and “deficient” performance of activities such as credit, finance, contracting, and procurement.²¹ The Commission recommended the abolition of the BIA and its replacement with a new agency to be called the “Indian Trust Services Administration,” which would have granted funds to tribes to contract for their own services.²²

A series of articles in the Arizona Republic in 1987 “startled” the Senate Committee on Indian Affairs into establishing a special committee to investigate stunning allegations of BIA mismanagement.²³ The committee held extensive hearings in response to charges that included breach of trust, criminal fraud, child abuse in BIA schools.²⁴

activities. See COHEN *id.* at 155 (citing S. REP. NO. 78-310, pt. 1 (1943)). The BIA underwent yet another reorganization in 1950 in order to carry out a range of termination policies. See COHEN *id.* at 158-59 (citing, e.g., SEC’Y INTERIOR ANN. REP. 343 (1950)).

18. S. REP. NO. 104-227 (1996).

19. BUREAU OF INDIAN AFFAIRS MGMT. STUDY, REPORT ON BIA MGMT. PRACTICES TO THE AM. INDIAN POLICY REVIEW COMM’N, 6 (1976).

20. REPORT ON FED. ADMIN. AND STRUCTURE OF INDIAN AFFAIRS, FINAL REPORT TO THE AM. INDIAN POLICY REVIEW COMM’N, 49 (1976).

21. PRESIDENTIAL COMMISSION, *supra* note 14, at 31.

22. *Id.*, at 31-32. Current BIA reorganization proposals hearken back to the controversial 1984 report of the Presidential Commission, which was headed by the Assistant Secretary for Indian Affairs at the time, Ross Swimmer, who now serves as Special Trustee, and included as a member Neal McCaleb, who served as Assistant Secretary for a brief time during which the new reorganization plans were announced.

23. *Special Committee on Investigations*, *supra* note 14, Part 1, at 1 (statement of Senator Inouye, Chairman, Select Committee on Indian Affairs).

24. *Id.* The Special Committee on Investigations published the transcripts of its hearings in eleven volumes, or, “Parts.” In addition, it issued a Final Report and Legislative Recommendations, stating that “BIA’s mismanagement is manifest in almost every area the Committee examined.” *Special Committee on Investigations*, FINAL REP. AND LEGISLATIVE RECOMMENDATIONS, S. REP. NO. 101-60, at 10 (1989).

The committee's investigation preceding the hearings had already led Senator DeConcini, its Chairman, to conclude that "[m]any of the Federal Indian programs are fraught with corruption and fraud. Most of the others are marred by mismanagement, and some by incompetence."²⁵

In 1990, Secretary Lujan chartered a Joint Tribal/BIA/DOI Reorganization Task Force. Over the next four years, the Joint Reorganization Task Force met twenty-two times across the country and developed forty-four recommendations for BIA reorganization, regulatory reform, educational reform, and budgetary reform, reportedly with little success.²⁶

In 2000, the report of the National Academy of Public Administration questioned the overall competence of BIA management and administrative staff, citing in particular a lack of expertise in the areas of planning, budgeting, human resources management, and information resource management.²⁷ The top job in the BIA continues to be a political hot potato, which often changes hands amidst charges of cronyism and incompetence.²⁸

C. *Defending the BIA*

Despite this constant drumbeat of disparagement, the BIA seems to have been remarkably immune to change. Moreover, when condemnation turns to calls for the abolition of the BIA, as it often does, prominent Indian leaders, tribes, and their supporters rush to the BIA's defense.²⁹ Some critics have argued that the BIA manipulates such tribal

25. *Id.* at 3.

26. See S. REP. NO. 104-227 (1996).

27. *Study of Management and Administration: The Bureau of Indian Affairs: Report of the National Academy of Public Administration Before the S. Comm. on Indian Affairs* (April 12, 2000) [hereinafter *NAPA*] (testimony of Mr. Royce Hanson, Panel Chair and Academy Fellow, National Academy of Public Administration).

28. See, e.g., *BIA official says he won't resign*, RAPID CITY J., October 14, 2004, at <http://www.rapidcityjournal.com/articles/2004/05/09/news/state/news04.txt> (reporting that Assistant Secretary Dave Anderson rejected calls for his resignation from Connecticut Sen. Christopher Dodd); Rolo, *supra* note 15; See also, *Top-level aides in BIA Washington office removed*, Indianz.com, August 13, 2004, at <http://www.indianz.com/News/2004/003825.asp?print=1>.

29. Leading the defense has been the National Congress of American Indians ("NCAI"). Founded in 1944, the NCAI is the oldest, largest and most representative American Indian and Alaska Native organization in the country. See <http://www.ncai.org>. The NCAI and other tribal advocates have been vocal in the support of the BIA. See, e.g., *Reorganization of Trust Mgmt. at the Bureau of Indian Affairs and the Office of the Spec. Trustee, Hearing Before the House Resources Comm.*, 108th Cong. (2004), available at <http://www.resourcescommittee.house.gov/archives/108/testimony>; *Proposed Reorganization of Major Agencies and Functions Related to Indian Trust Reform Matters Within the Dep't of the Interior, Hearing Before the S. Comm. of Indian Affairs*, 108th Cong. (March 10, 2004), available at <http://indian.senate.gov>; *Trust Reform And Related Matters, Hearing Before the S. Comm. on Indian Affairs*, 108th Cong. (2003), available at <http://indian.senate.gov>. See also *Indian Country's Ugly Baby* ¶¶ 1-3 (Nov. 5, 2003) at

demonstrations of support with the selective distribution of rewards and punishments, especially at the Area (now Regional) Office level.³⁰

Others might argue that Indian tribes view the BIA as their main advocate, however weak, within the federal bureaucracy, in part because BIA personnel are largely drawn from tribal ranks, thanks to Indian preference in BIA hiring.³¹ The long-time Director of the American Indian Law Center recently expressed his own ambivalence about the notion that “if you attack the Bureau of Indian Affairs, you are attacking Indians.”³²

Perhaps the main reason that tribal advocates continue to defend the BIA in the face of persistent attack, however, is that the BIA has become emblematic of the federal government’s commitment to tribal sovereignty and the individual well-being of Native Americans. This commitment, combined with the obligation to manage Indian lands and funds, is commonly referred to as the federal trust responsibility to Indians. Although rooted in the United States Constitution, the trust responsibility has been developed and defined through a series of opinions by the United States Supreme Court, and exercised primarily by the BIA. Threats to the continued existence of the BIA naturally arouse concern that the United States may be backing away from this commitment.

<http://www.indianz.com/News/archives/002380.asp> (“When the Bush administration in November 2001 proposed creating a new agency to handle Indian trust assets, tribal leaders rushed to keep the Bureau of Indian Affairs from certain death. Without the BIA, they argued, there was no trust responsibility. ‘If it’s our ugly baby, then we need to fix it,’ one tribal leader said. The spirited defense befuddled the Republicans, who thought they were doing Indians a favor. ‘To my great surprise, the tribes are very strongly attached to the Bureau of Indian Affairs,’ Secretary of Interior Gale Norton would later tell a House committee.”).

30. See, e.g., Russel Lawrence Barsch, *The BIA Reorganization Follies of 1978: A Lesson in Bureaucratic Self-Defense*, 2 AM. INDIAN L. REV. 1, 5 (1980). “The Area Director’s ‘bundle of carrots and sticks seems endless. If a tribe is cooperative, special funds are found to meet special tribal projects . . . [if not, a]pproval of tribal actions are often delayed or have to be changed.’” *Id.* (citing Hearings, Bureau of Indian Affairs Organization, Senate Select Comm. On Indian Affairs, 95th Cong. 97, 114 (1978)).

31. Act of June 18, 1934 § 11, 25 U.S.C. § 472 (2000). BIA regulations are found at 25 C.F.R. pt. 5 (2004). The preference also extends to employment in connection with BIA grants. See 25 C.F.R. § 276.13 (2004). The hiring preference has been upheld against a constitutional discrimination claim, as a being “political rather than racial in nature.” *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974). Emphasizing the political nature of such a preference, a recent ruling upheld the awarding of a military contract to a Native American firm pursuant to a preference for such firms embodied in the statute authorizing the contract, even though the preference at issue does not involve a matter unique to Native Americans, nor does it implicate any political relationship between tribes and the federal government. *Am. Fed’n of Gov’t Employees v. United States*, 330 F.3d 513, 517-18 (D.C. Cir. 2003).

32. Sam Deloria, *Commentary on Nation-Building: The Future of Indian Nations*, 34 ARIZ. ST. L.J. 55 (2002).

D. Reforming the BIA

Yet, in the wake of federal policies that for more than three decades have increasingly emphasized greater tribal control over Indian programs, many question whether a legitimate trust role remains for the BIA. This transfer of administrative responsibility from the BIA to the tribes, under the mantle of “Indian Self-Determination,”³³ has led even the United States Supreme Court to suggest that the trust responsibility may be incompatible with Indian self-governance.³⁴ A top Indian affairs official has forthrightly proposed the abolition of the BIA, the termination of the trust responsibility, and the transfer of all remaining responsibilities to the tribes themselves.³⁵

Such developments alarm tribal advocates, who fear that a policy they have encouraged and embraced for the past thirty years, Self-Determination,³⁶ could turn out to be something of a Trojan horse, ushering in a full-scale assault on the single most cherished attribute of federal Indian policy—the federal trust responsibility.³⁷ Although they raise serious questions about the motivations and objectives of some of the proponents of BIA reorganization, few tribal advocates deny that there is plenty of room for regulatory reform. Thus, they ask whether reform can be accomplished in a way that both strengthens tribal sovereignty and reinforces the federal trust responsibility.

The original architects of the Self-Determination policy suggested one possible answer. Believing that many of the alleged failures of the BIA were attributable less to incompetence of BIA employees than to institutional conflicts of interest within the Department of the Interior

33. This policy of “Self-Determination” has its origins in President Nixon’s 1970 message to Congress on Indian affairs. *See* President’s Special Message to the Congress on Indian Affairs, 213 PUB. PAPERS 564 (July 8, 1970); *see also* H.R. REP. DOC. NO. 91-363 (1970) (outlining tribal self-determination policy).

34. *United States v. Navajo Nation*, 537 U.S. 488, 508 (2003) (suggesting that the government has a lesser trust responsibility where the tribe assumes more control over decision-making concerning its resources.)

35. *Bureau of Indian Affairs’ Capacity and Mission, Oversight Hearing before the S. Comm. on Indian Affairs*, 106th Cong. (1999) (Testimony of Ross O. Swimmer, Former Assistant Secretary for Indian Affairs). Mr. Swimmer currently serves as Special Trustee for American Indians.

36. The policy is immensely popular with tribes and Congress alike. On its thirtieth anniversary, the United States Senate praised the Self-Determination policy as “the most successful policy of the United States in dealing with the Indian tribes.” *See* S. Res. 106-277, 106th Cong. (2000). The resolution praised the policy because “it rejects the failed policies of termination and paternalism . . . recognizing that cultural pluralism is a source of strength.” *Id.*

37. *See, e.g., Trust Reform And Related Matters, supra* note 29 (May 21, 2003) (Testimony of Clifford Marshall, Chairman, Hoopa Valley Tribe, rejecting the notion that “contracting and compacting under the Self-Determination and Self-Governance Acts somehow relieves the United States of their trust obligations to tribes and individual Indians.”). *See also* Raymond Cross, *The Federal Trust Duty in an Age of Indian Self-Determination: An Epitaph for a Dying Doctrine?*, 39 TULSA L. REV. 369 (2003).

(DOI), which houses the BIA, and the Department of Justice (DOJ), the American Indian Policy Review Commission (AIPRC) recommended in 1977 that Indian affairs be elevated to cabinet-level status.³⁸ President Nixon wrote to the Senate Indian Affairs Committee in 1989 to remind it of his twenty-year-old proposal to create an “Independent Trust Counsel Authority” to advocate for the trust responsibility to Indians.³⁹ Numerous witnesses told the Committee of the need for independent legal representation of the trust responsibility, including such former administration officials as Reid Chambers (Associate Solicitor for Indian Affairs), Leonard Garment (Special Counsel to President Nixon), and Louis Clairborne (Solicitor General).⁴⁰

The Senate Indian Affairs Committee has observed that, “[d]espite the federal government’s long-standing obligation to protect Indian natural resources, they have been left unprotected, subject to, at best, benign neglect and, at worst, outright theft by unscrupulous companies.”⁴¹ The Committee laid much of the blame on agencies other than the BIA, including the Interior’s Bureau of Land Management, Minerals Management Service, and Office of the Solicitor.⁴² Others note that it is not merely a lack of administrative capacity and bureaucratic independence that handicaps the BIA, but also federal policy itself. An Assistant Secretary for Indian Affairs commented upon this simple fact.

The mission of the Bureau of Indian Affairs has changed dramatically

38. AMERICAN INDIAN POLICY REVIEW COMM., FINAL REPORT 287-89 (1977) [hereinafter AIPRC]. This recommendation was reflected as well in the testimony of many tribal leaders who appeared before the various AIPRC task forces. *See, e.g.*, REPORT ON FEDERAL ADMINISTRATION AND STRUCTURE OF INDIAN AFFAIRS, FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION 61-63 (1976); REPORT ON TRUST RESPONSIBILITIES AND THE FEDERAL-INDIAN RELATIONSHIP INCLUDING TREATY REVIEW, FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION 3-6 (1976).

39. *Special Committee on Investigations*, *supra* note 14, part 3, at 256-57.

40. *Id.*, at 662-65 (letter to President Bush from Committee Co-Chairs). *See also* R. Chambers, Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary, 91st Cong., A Study of Admin. Conflicts of Interest in the Protection of Indian Natural Resources (Comm. Print 1971). Mr. Chambers is also the author of a seminal article concerning the trust responsibility. Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 Stan. L. Rev. 1213, 1226-27 (1975). Support for the creation of a separate litigating agency outside of the Departments of Justice and Interior has not lessened noticeably in the intervening years. *See, e.g.*, Ann C. Juliano, *Conflicted Justice: The Department of Justice’s Conflict of Interest in Representing Native American Tribes*, 37 GA. L. REV. 1307 (Summer, 2003). Some Indian advocates fear, however, that a separate trust counsel would isolate Indian interests from agency decision-making. *See, e.g.*, *Colloquium, Federal Trust Responsibility and Conflicts of Interest: Environmental Protection or Natural Resource Development?*, 71 N.D. L. Rev. 365, 374-75 (1995) (comments of Professor Sam Deloria).

41. *Special Committee on Investigations*, FINAL REP. AND LEGISLATIVE RECOMMENDATIONS, *supra* note 24, at 105.

42. *Id.* at 113-40.

from its intended mission 150 years ago to what it has become today. In fact, the mission of the Bureau has changed on average about every 25 years as American Indian policy has changed. Simply stated, the mission of the Bureau is to promote and execute the policy of the day of any given Administration and Congress dealing with American Indians and their governing organizations.⁴³

United States Senator Ben Nighthorse Campbell, Chairman of the Indian Affairs Committee, acknowledges the role of Congress in creating the conditions that result in allegations of BIA failure.

For too many years, the bureau has been one of the most under-rated and overly-criticized agencies in the federal government. It is the agency that Indian country and appropriators love to hate. In recent years, the administrative capabilities of the bureau of Indian affairs have been decimated by government-down-sizing, early retirement authority, and diminishing resources. Nonetheless, we continue to charge the bureau with an ever-increasing and wider range of responsibilities — in furtherance of the United States trust responsibilities — while failing to provide the bureau with the resources any agency would need to carry out these duties. Add to that the impact of self-determination contracting and self-governance compacting on the ranks and functions of the bureau — and it is a small wonder that this agency is perceived by its critics to be operating under siege and unable to meet the task.⁴⁴

The U.S. Commission on Civil Rights⁴⁵ recently issued a report that cites the inadequacy of federal programs intended to assist Native Americans not only at the U.S. Department of the Interior (“DOI”), but also at the U.S. Department of Justice (“DOJ”), the U.S. Department of Health and Human Services (“HHS”), the U.S. Department of Housing and Urban Development (“HUD”), the U.S. Department of Education (“DOEd”), and the U.S. Department of Agriculture (“DOA”).⁴⁶ The

43. *Bureau of Indian Affairs' Capacity and Mission*, *supra* note 35 (Testimony of Ross O. Swimmer, Former Assistant Secretary for Indian Affairs).

44. *Bureau of Indian Affairs' Capacity and Mission*, *supra* note 35 (Chairman Campbell's Opening Statement).

45. The U.S. Commission on Civil Rights is an independent, bipartisan agency established by Congress in 1957 pursuant to Public Law No.103-419.

46. U.S. COMM'N ON CIVIL RIGHTS, A QUIET CRISIS, FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY (2003), at <http://www.usccr.gov/pubs/na0703/na0731.pdf> [hereinafter A QUIET CRISIS]. In addition to the BIA, a wide variety of federal agencies administer programs that provide assistance to Native Americans. *See, e.g.*, ROGER WALKE, FEDERAL PROGRAMS OF ASSISTANCE TO NATIVE AMERICANS, A REPORT PREPARED FOR THE SENATE SELECT COMMITTEE ON INDIAN

Commission found that significant disparities in federal funding exist between Native Americans and other groups in our nation, as well as the general population.⁴⁷ The Commission also reported a finding by the Congressional Research Service that, when adjusting for inflation between 1975 and 2000, Indian programs at the DOI experienced a yearly appropriations decline of \$6 million, leaving unfunded \$7.4 billion in unmet needs among Native Americans in 2000.⁴⁸

As a result, according to the Commission, “Native Americans continue to rank at or near the bottom of nearly every social, health, and economic indicator,” as compared to other groups in American society. Native Americans suffer “higher rates of poverty, lower educational achievement, more substandard housing, and higher rates of disease and illness.”⁴⁹

This multi-faceted critique of federal Indian policy provides a historic backdrop for today’s BIA-bashing and the current debate over BIA reorganization and reform. The most immediate impetus for renewed scrutiny of the BIA, however, is a class action lawsuit filed by Native American beneficiaries of individual Indian money (“IIM”) accounts held in trust by the BIA, seeking an accounting of all funds collected by the BIA on behalf of individual Indian landowners over the course of the last century.⁵⁰ The DOI has launched a massive program of trust reform⁵¹ in response to a seemingly endless stream of court orders in *Cobell v. Babbitt* (renamed *Cobell v. Norton* after the substitution of the current Secretary of the Interior).⁵²

AFFAIRS, S. REP. NO. 102-62 (1991).

47. A Quiet Crisis, *supra* note 46, at 10-12.

48. *Id.* at 24.

49. *Id.* at ix.

50. *Cobell v. Babbitt*, 52 F. Supp. 2d 11 (D.D.C. 1999), *aff’d sub. nom. Cobell v. Norton*, 240 F. 3d 1081 (D.C. Cir. 2001).

51. The Department’s Comprehensive Trust Management Plan is online at http://www.doi.gov/indiantrust/pdf/doi_trust_management_plan.pdf.

52. *Cobell v. Babbitt*, 30 F. Supp. 2d 24, 27-29 (D.D.C. 1998) (certified the class); *Cobell v. Babbitt*, 37 F. Supp. 2d 6 (D.D.C. 1999) (held then-Secretary Babbitt and then-Assistant Secretary Gover in civil contempt for violating two discovery orders); *Cobell v. Babbitt*, 52 F. Supp. 2d 11, 34 (D.D.C. 1999) (denied government motion for summary judgment); *Cobell v. Babbitt*, 188 F.R.D. 122 (D.D.C. 1999) (ordered the defendants to pay plaintiffs expenses and attorneys’ fees); *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 58 (D.D.C. 1999) (ordered defendants to take certain steps the court deemed necessary to provide an accounting of the IIM trust); *Cobell v. Norton*, 240 F.3d 1081 (2001) (affirmed the district court’s holding that the officials, who serve as trustee delegates for the federal government, had breached their fiduciary duties, and remanded for further proceedings); *Cobell v. Norton*, 175 F. Supp. 2d 24 (D.D.C. 2001) (ordered Gale Norton, Secretary of the Interior, and Neal McCaleb, Assistant Secretary of the Interior for Indian Affairs, to show cause why they should not be held in civil contempt of court); *Cobell v. Norton*, 226 F. Supp. 2d 1, 161 (D.D.C., 2002) (“Contempt Order,” held Secretary Norton and Assistant Secretary McCaleb “in civil contempt of court . . .”), *vacated by, in part, remanded by Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003); *Cobell v. Norton*, 226 F. Supp. 2d 163 (D.D.C. 2002) (“Monitor Order” and “Special

E. Understanding the BIA

Whereas there are serious issues to be addressed to ensure the fair and accurate accounting of individual trust funds, the current rush to reform may threaten to throw out the baby with the bathwater while failing to address more basic problems with federal Indian policy. This article attempts to chronicle proposals for BIA reform and reorganization in the context of the vast array of BIA duties and programs, the federal trust responsibility, and overall federal Indian policy. Rather than scapegoat the agency and its employees for the sometimes tragic consequences of such programs and policies, however, the article seeks to illuminate the many competing forces that historically shape such outcomes. At the same time, by focusing on the nuts and bolts of the agency's work, the article seeks both to provide firm ground for reform proposals and to facilitate the implementation of the BIA's truly admirable mission.

Today, that mission is ambitious in scope:

The [BIA's] responsibility is the administration and management of 55.7 million acres of land held in trust by the United States for American Indians, Indian tribes, and Alaska Natives. There are 562 federal recognized tribal governments in the United States. Developing forestlands, leasing assets on these lands, directing agricultural programs, protecting water and land rights, developing and maintaining infrastructure and economic development are all part of the agency's responsibility. In addition, the Bureau of Indian Affairs provides education services to approximately 48,000 Indian students.⁵³

Part II of the article provides an overview of the BIA, its history, and

Master-Monitor Order"), *vacated in part, remanded by* Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003); Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003); Cobell v. Norton, 274 F. Supp. 2d 111, 135 (D.D.C. 2003) (preliminary injunction requiring the Department of the Interior to "immediately disconnect from the Internet all Information Technology Systems within [its] custody or control . . . until such time as the Court approves their reconnection to the Internet. . ."); superseded and replaced, by Cobell v. Norton, 310 F. Supp. 2d 77 (D.D.C. 2004) (requiring disconnection of substantially all of the Department of the Interior's computer systems from the Internet, and ordering the Secretary to submit a plan for secure reconnection of Interior's computer systems), *vacated by, remanded by* Cobell v. Norton, No. 03-5262, 2004 WL 2753197 (D.C. Cir. Dec. 3, 2004); Cobell v. Norton, 283 F. Supp. 2d 66 (D.D.C. 2003) (structural injunction imposing deadlines to complete accounting of Native American trust account funds), *vacated by, in part, remanded by* Cobell v. Norton, No. 03-5314, 2004 WL 25473 (D.C. Cir. Dec. 10, 2004); *Cobell v. Norton*, No. 03-5262, 2004 WL 2753197 (D.C. Cir. Dec. 3, 2004); Cobell v. Norton, No. 03-5314, 2004 WL 25473 (D.C. Cir. Dec. 10, 2004). These orders may be found at <http://www.doi.gov/pfm/5year2004/index.html>. All orders of the Court and Special Master in the Cobell case are also available at <http://www.indiantrust.com/rulings>.

53. <http://www.doi.gov/bureaus.html>.

its current structure and responsibilities. Thereafter, the article describes in some detail the ways in which the agency carries out its statutory mandates, citing the BIA's regulatory code,⁵⁴ highlighting current issues, noting conflicting federal policy priorities, and documenting the persistent shortage of resources to address unmet Indian needs. Administrative and judicial construction of the Indian laws and regulations, in the context of appeals from BIA actions, provides an additional counterpoint to each of the subsequent parts of this article.

The article concludes with observations regarding the prospects for a revitalized BIA, one that has the support and confidence of tribal governments and the resources to make a significant contribution, as pledged by a former BIA leader, to "the rebirth of joy, freedom, and progress for the Indian Nations."⁵⁵

II. THE BIA AND THE FEDERAL TRUST OBLIGATION TO AMERICAN INDIANS

A. *The BIA and the Department of the Interior*

The DOI is a massive federal agency that manages one out of every five acres of land in the United States; provides the resources for nearly one-third of the Nation's energy; provides water to thirty-one million citizens through 824 dams and reservoirs; administers 388 units of the national park system, 544 wildlife refuges and vast areas of multiple-use lands; facilitates hunting and fishing on millions of acres of public and private lands.⁵⁶ It comprises numerous bureaus and offices, including the Fish and Wildlife Service;⁵⁷ the Bureau of Reclamation;⁵⁸ the Office of Surface Mining;⁵⁹ the Minerals Management Service;⁶⁰ the National Park

54. 25 C.F.R.

55. *Gover, supra* note 2, at 161.

56. See <http://www.doi.gov>.

57. The mission of the U.S. Fish and Wildlife Service ("FWS") is to conserve, protect, and enhance fish, wildlife, and their habitats for the continuing benefit of the American people. Primary responsibilities are for migratory birds, endangered species, freshwater and anadromous fisheries, and certain marine mammals. FWS also has a continuing cooperative relationship with a number of Indian tribes throughout the National Wildlife Refuge System and the Service's fish hatcheries. See generally 50 C.F.R. pts. 1-199, 400-499 (2004).

58. The Bureau of Reclamation ("BOR") operates a wide range of water resource management projects for irrigation, hydroelectric power generation, municipal and industrial water supplies, flood control, outdoor recreation, enhancement of fish and wildlife habitats, and research. Most of Reclamation's activities involve construction, operations and maintenance, and management of water resources projects and associated facilities. See generally 43 C.F.R. pts. 200-499 (2004).

59. The Office of Surface Mining and Reclamation Enforcement regulates surface coal mining and reclamation operations, and reclaims abandoned coal mines, in cooperation with States and Indian tribes. See generally 43 C.F.R. pts. 700-999 (2004).

60. The Minerals Management Service ("MMS") provides stewardship of America's

Service;⁶¹ the Bureau of Land Management;⁶² and the U.S. Geological Survey.⁶³ The Office of the Solicitor provides legal counsel to the various DOI agencies, and ultimately to the Secretary.⁶⁴

The BIA, in turn, is itself a complex organization, with twelve Regional offices, nearly 100 agencies and field offices located throughout the country, and approximately 10,000 employees.⁶⁵ Although Indian preference creates a relatively small pool from which BIA fills its employee ranks, the history of relationships between the United States and the Indian Nations is marked by Indians' deep and understandable mistrust of the government. The fact that BIA employees are drawn from tribal ranks helps to introduce a small measure of trust and is sometimes perceived as one small way in which the United States fulfills its trust—through the provision of employment and business contracting preference to Indians. Moreover, many BIA employees have demonstrated, at the grassroots level, that their commitment to serve Indians is more than just a job.⁶⁶

offshore resources and collects revenues generated from mineral leases on Federal and Indian lands. MMS is responsible for the management of the Federal Outer Continental Shelf, which are submerged lands off the coasts that have significant energy and mineral resources. Within the offshore minerals management program, environmental impact assessments and statements, and environmental studies, may be available if a self-governance tribe demonstrates a special geographic, cultural, or historical connection. *See generally* 43 C.F.R. pts. 200-299 (2004).

61. The National Park Service (“NPS”) administers the National Park System made up of national parks, monuments, historic sites, battlefields, seashores, lake shores and recreation areas. NPS maintains the park units, protects the natural and cultural resources, and conducts a range of visitor services such as law enforcement, park maintenance, and interpretation of geology, history, and natural and cultural resources. *See generally* 36 C.F.R. pts. 1-199 (2004).

62. The Bureau of Land Management’s (“BLM”) responsibilities cover a wide range of areas, such as recreational activities, timber, range and minerals management, wildlife habitat management and watershed restoration. In addition, BLM is responsible for the survey of certain Federal and tribal lands. Two programs provide tribal services: (1) Tribal and allottee minerals management; and (2) Survey of tribal and allottee lands. *See generally* 43 C.F.R. Chapter II, pts. 1000-9999 (2004).

63. The mission of the United States Geological Survey (“USGS”) is to provide information on biology, geology, hydrology, and cartography that contributes to the wise management of the Nation’s natural resources and to the health, safety, and well-being of the American people. Information includes maps, data bases, and descriptions and analyses of the water, plants, animals, energy, and mineral resources, land surface, underlying geologic structure and dynamic processes of the earth. Information on these scientific issues is developed through extensive research, field studies, and comprehensive data collection to: evaluate natural hazards such as earthquakes, volcanoes, landslides, floods, droughts, subsidence and other ground failures; assess energy, mineral, and water resources in terms of their quality, quantity, and availability; evaluate the habitats of animals and plants; and produce geographic, cartographic, and remotely-sensed information in digital and non-digital formats. *See generally*, 43 C.F.R. pts. 400-499 (2004).

64. *See* <http://www.doi.gov/sol>.

65. The twelve BIA Regional Offices are located in Portland, Oregon; Sacramento, California; Phoenix, Arizona; Albuquerque, New Mexico; Anadarko, Oklahoma; Muskogee, Oklahoma; Nashville, Tennessee; Minneapolis, Minnesota; Aberdeen, South Dakota; and Billings, Montana. *See* <http://www.doi.gov/bureaus.html>.

66. *See, e.g.*, H.R. REP. NO. 108-343 (2004), to accompany H.R. Con. Res. 237, honoring the

Like all federal employees, those at the BIA are subject to civil and/or criminal penalties for violation of certain laws concerning ethical conduct and financial conflict of interest.⁶⁷ Among these are post-government employment restrictions against representing anyone in a matter that the former employee previously represented the government, and in which the government has a continuing interest.⁶⁸ There is an exception, however, for former officers and employees of the United States who are employed by Indian tribes as agents or attorneys in such matters.⁶⁹ Several ethics statutes are unique to DOI employees, including laws that prohibit certain employees from acquiring interests in federal lands.⁷⁰

Federal ethics regulations applicable to all federal employees provide that “[p]ublic service is a public trust, requiring employees to put loyalty to the Constitution, the laws, and ethical principles above private gain.”⁷¹ The regulations set forth fourteen general principles of ethical conduct and several sections of detailed rules regarding matters such as accepting gifts from outside sources, gifts between employees, conflicting financial interests, impartiality in performing official duties, seeking other employment, misuse of position, and outside activities.⁷² They also set forth a long list of related statutory authorities.⁷³ Interior has promulgated supplemental regulations with specific standards of ethical conduct for DOI employees.⁷⁴ Among other things, these regulations prohibit all DOI employees from acquiring rights granted by the Department in federal lands.⁷⁵

late Rick Lupe, Lead Forestry Technician for the BIA Fort Apache Agency, *available at* <http://www.resourcescommittee.house.gov>. (Mr. Lupe, a member of the White Mountain Apache Tribe, died on June 19, 2003, from burns sustained in a prescribed fire. He had participated in fighting multiple fires over the years in Arizona and was honored in particular for helping to save communities like Show Low, Arizona, from the Rodeo-Chediski fire.) *See also* Linda Sue Warner & Jim Hastings, *A Research Study to Determine Perceptions of Job-Related Stress by Bureau of Indian Affairs Education Employees*, 35 J. AM. INDIAN EDUC. 1 (Oct. 1995). (A study that examined perceptions of job-related stress by BIA education employees in day schools and education employees in boarding schools found that employees in boarding schools are frequently involved in all aspects of the students’ lives, that many employees act in roles designed to serve as surrogate parents or family members, that some employees recognize tribal kinship ties and maintain current interest in the academic, behavioral, mental, and physical aspects of students’ lives, all without any extra recognition or compensation.)

67. *See* 18 U.S.C. §§ 203-209.

68. *See* 18 U.S.C. § 207.

69. *See* 25 U.S.C. § 450i(j).

70. *See, e.g.*, 43 U.S.C. § 11 (BLM); 43 U.S.C. § 31(a) (USGS).

71. 5 C.F.R. § 2635.101(b)(1).

72. *See generally*, 5 C.F.R. pt. 2635.

73. 5 C.F.R. § 2635.902.

74. 5 C.F.R. pt. 3501.

75. 5 C.F.R. § 3501.103(c).

B. Statutory and Regulatory Authorities

Title 25 of the United States Code is dedicated exclusively to Indian affairs, with many of the statutes relating to the responsibilities of the Secretary of the Interior and the BIA.⁷⁶ The AIPRC Task Force on Consolidation, Revision and Codification of Federal Indian Law recommended in its 1976 Report that Title 25 be thoroughly revised, noting that “Title 25 is now packed with statutory provisions which are either superceded by subsequent legislation, obsolete by virtue of passage of time, redundant to prior legislation, or in total conflict with present policies relating to the administration of Indian affairs.”⁷⁷ Similarly, Title 25 of the Code of Federal Regulations (“CFR”) contains the rules the BIA has promulgated to implement these laws and the agency’s responsibilities thereunder.⁷⁸ Title 43 of the CFR contains

76. 25 U.S.C. §§ 1-17, Bureau of Indian Affairs; §§ 21-68(a), Officers of Indian Affairs; §§ 70-70(w) (omitted or repealed), Indian Claims Commission; §§ 71-88, Agreements with Indians; §§ 91-166, Performance by United States of Obligations to Indians; §§ 171-202, Protection of Indians; §§ 211-266, Government of Indian Country and Reservations; §§ 267-304(b), Education of Indians; §§ 305-310, Promotion of Social and Economic Welfare; §§ 311-328, Rights-of-way Through Indian Lands; §§ 1451-1544, Allotment of Indian Lands; §§ 371-380, Descent and Distribution; Heirs of Allottee; §§ 381-90, Irrigation of Allotted Lands; §§ 391-416(j), Lease, Sale or Surrender of Allotted or Unallotted Land; §§ 331-358 (transferred), Ceded Indian Lands; §§ 441-1300(n), Miscellaneous (Indian self-determination and education assistance as well as many tribe-specific statutes); §§ 1301-1341, Constitutional Rights of Indians; §§ 1401-1408, Distribution of Judgment Funds; §§ 1451-1544, Financing Economic Development of Indians and Indian Organizations; §§ 1601-1683, Indian Health Care; §§ 1701-1778(h), Indian Land Claims Settlements; §§ 1801-1900, Tribally Controlled Community College Assistance; §§ 1901-1963, Indian Child Welfare; §§ 2001-2026, BIA Programs; §§ 2101-2108, Development of Tribal Mineral Resources; §§ 2201-2219, Indian Land Consolidation; §§ 2301-2307, Old Age Assistance Claims Settlement; §§ 2401-2478, Indian Alcohol and Substance Abuse Prevention and Treatment; §§ 2501-2511, Tribally Controlled School Grants; §§ 2601-2651 (repealed), Indian Education Program; §§ 2701-2721, Indian Gaming Regulation; §§ 2801-2809, Indian Law Enforcement Reform; §§ 2901-2906, Native American Languages; §§ 3001-3013, Native American Graves Protection and Repatriation; §§ 3101-3120, National Indian Forest Resources Management; §§ 3201-3211, Indian Child Protection and Family Violence Prevention; §§ 3301-3371, Indian Higher Education Programs; §§ 3401-3417, Indian Employment, Training and Related Services; §§ 3501-3506, Indian Energy Resources; §§ 3601-3631, Indian Tribal Justice Support; §§ 3651-3681, Indian Tribal Justice Technical and Legal Assistance; §§ 3701-3746, American Indian Agricultural Resources Management; §§ 3801-3804, Indian Dams Safety; §§ 3901-3908, Indian Lands Open Dump Cleanup; §§ 4001-4006, American Indian Trust Fund Management Reform; §§ 4101-4142, Native American Housing Assistance and Self-Determination; §§ 4301-4307, Native American Business Development, Trade Promotion, and Tourism.

77. AIPRC, *supra* note 38, PETER S. TAYLOR, LETTER OF TRANSMITTAL, CONSOLIDATION, REVISION AND CODIFICATION OF FED. INDIAN LAW, FINAL REP. TO THE AIPRC, at iv (1976).

78. 25 C.F.R. pts. 1-5 (2004), procedures and practice; pts. 10-13, law and order; pts. 15-17, probate; pts. 20-27, human services; pts. 31-46, education; pts. 61-91, tribal government; pts. 101-143, financial activities; pts. 150-183, land and water; pts. 200-227, energy and minerals; pts. 241-249, fish and wildlife; pt. 256, housing improvement program; pts. 262-265, heritage preservation; pts. 273-276, Indian self-determination and education assistance programs; pts. 286-291, economic enterprises; pts. 301-310, Indian Arts and Crafts Board; pts. 501-599, the National Indian Gaming Commission; pts. 700-899, the Office of Navajo and Hopi Relocation; pt. 900, contracts under the Indian Self-Determination and Education Assistance Act with BIA and the Indian Health Service;

additional DOI rules, some of which pertain to the BIA.⁷⁹

In addition to regulations promulgated in the CFR, BIA publishes a mind-numbing series of instructions to its employees in form of the BIA Manual (“BIAM”). Although the content of the BIAM is beyond the scope of this article, it has been described as “a confusing, often contradictory, and generally inefficient compilation of policy and procedure ranging from generally inadequate . . . to absolutely unfathomable.”⁸⁰ A Senate Committee once set out to require BIA to “revoke all provisions of the BIA Manual that are not promulgated as proposed regulations,” noting that the BIAM comprised some 14,000 pages at that time.⁸¹

C. Enforcement of the Federal Trust Responsibility

Foremost among the responsibilities historically delegated to the BIA is the duty to manage Indian lands and funds, often thought of as the essence of the federal trust responsibility to Indians. Although its roots are in the United States Constitution,⁸² the federal trust responsibility has been developed and defined through a series of opinions by the United States Supreme Court. Chief Justice John Marshall first invoked the concept in 1831, characterizing the relation of the Cherokee Nation to the United States as that of a ward to his guardian.⁸³

Subsequent Court opinions have relied upon the guardian-ward analogy to uphold the “plenary power” of Congress to enact statutes extending federal criminal jurisdiction over Indians,⁸⁴ and allotting tribal lands without obtaining tribal consent.⁸⁵ The Court has also recognized that the trust relationship places some limits on the power of the

pts. 1000-1001, annual funding agreements and tribal self-governance programs; and pt. 1200, Office of the Special Trustee for American Indians and the Trust Fund Reform Act.

79. Foremost among these are 43 C.F.R. pt. 1 (2003), practices before the DOI; pt. 2, records, testimony and Freedom of Information Act regulations; pt. 4, DOI hearings and appeals procedures; pt. 7, protection of archaeological resources; and pt. 10, Native American graves protection and repatriation.

80. AIPRC, *supra* note 38, CONSOLIDATION, REVISION AND CODIFICATION OF FED. INDIAN LAW, FINAL REP. TO THE AIPRC, 343 (1976).

81. S. REP. NO. 104-227 (1996) (providing for the reorganization of the Bureau of Indian Affairs, and for other purposes).

82. U.S. CONST. art. I, § 8, cl. 3 (Congressional power to regulate commerce with the Indian tribes); U.S. CONST. art. II, § 2, cl. 2 (presidential power to make treaties); U.S. CONST. art. IV, § 3, cl. 2 (Congressional power to make regulations governing the territory of the United States).

83. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

84. *United States v. Kagama*, 118 U.S. 375, 384-85 (1886); *United States v. Sandoval*, 231 U.S. 28 (1913).

85. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

government to infringe upon Indian property rights.⁸⁶

In the seminal case of *Mitchell v. United States (Mitchell II)*,⁸⁷ the Supreme Court held that statutes and regulations pertaining to timber management by the BIA created a judicially enforceable trust responsibility upon the U.S. to follow those statutes and regulations. In an earlier ruling (*Mitchell I*),⁸⁸ the Court had found the General Allotment Act, 25 U.S.C. § 1331, created only a minimal trust relationship between the Indian landowner and the U.S. concerning timber management. In the second case, that responsibility was made enforceable in damages by the more specific laws regarding timber management.⁸⁹

In two cases decided in 2003, the Supreme Court clarified the parameters of the trust responsibility where there is no express statutory mandate.⁹⁰ In *United States v. White Mountain Apache Tribe*, the Court ruled the United States was liable in money damages for failing to maintain and repair buildings placed into trust for the *White Mountain Apache Tribe* under a 1960 statute that allowed the BIA to use and occupy the buildings.⁹¹

The Tribe had sued the United States for the amount necessary to rehabilitate the property occupied by the Government in accordance with standards for historic preservation, alleging that the United States had breached a fiduciary duty to maintain, protect, repair, and preserve the trust property.⁹² The Court of Federal Claims dismissed the complaint, reasoning that no statute or regulation could fairly be read to impose a legal obligation on it to maintain or restore the trust property, let alone authorize compensation for breach. The Federal Circuit reversed and remanded on the understanding that the Government's property use under the 1960 Act triggered a common law trustee's duty to act reasonably to preserve any property the Secretary chose to utilize, an obligation fairly interpreted as supporting a money damages claim.⁹³

The Supreme Court held that the 1960 Act gives rise to Indian Tucker Act jurisdiction in the Court of Federal Claims over the Tribe's suit for money damages against the United States.⁹⁴ The Court held that

86. *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

87. 463 U.S. 206 (1983) (*Mitchell II*).

88. *United States v. Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*).

89. *Mitchell II*, 463 U.S. at 226.

90. *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003); *United States v. Navajo Nation*, 537 U.S. 488 (2003).

91. *White Mountain Apache Tribe*, 537 U.S. at 474-75.

92. *Id.* at 470.

93. *See id.* at 471.

94. The Indian Tucker Act, 28 U.S.C. § 1505 (2004), invested the Court of Federal Claims

it is not necessary to find an explicit money-mandating provision in the relevant statute, but rather the less demanding requirement of “fair inference that the law was meant to provide a damage remedy for breach of a duty.”⁹⁵

The Supreme Court focused not just on the wording of the 1960 Act, but on the actual control asserted by the United States over the trust property.

As to the property subject to the Government’s actual use, then, the United States has not merely exercised daily supervision but has enjoyed daily occupation, and so has obtained control at least as plenary as its authority over the timber in *Mitchell II*. While it is true that the 1960 Act does not, like the statutes cited in that case, expressly subject the Government to duties of management and conservation, the fact that the property occupied by the United States is expressly subject to a trust supports a fair inference that an obligation to preserve the property improvements was incumbent on the United States as trustee. This is so because elementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch.⁹⁶

On the same day that it ruled in the *White Mountain Apache* case, the Court issued an opinion in *United States v. Navajo Nation*,⁹⁷ holding the United States was not liable for damages in failing to obtain the highest possible royalty rate for the Tribe in a coal mining lease with a third party, where the relevant statute merely requires federal *approval* of the lease negotiated between the parties.⁹⁸ Initially, the Court of Federal Claims found that the government owed general fiduciary duties to the Tribe, which the Secretary had “flagrantly dishonored by acting in the best interests of Peabody Coal Company rather than the Tribe.” Nevertheless, the court concluded that the Tribe had entirely failed to link that breach of duty to any statutory or regulatory obligation that could be fairly interpreted as mandating compensation for the government’s fiduciary wrongs.⁹⁹

with jurisdiction to render judgments in certain claims by Indian tribes against the United States, including claims based on an Act of Congress.

95. *White Mountain Apache Tribe*, 537 U.S. at 475.

96. *Id.* at 475.

97. 537 U.S. 488 (2003).

98. *Id.* at 503. The statute primarily at issue was the Indian Mineral Leasing Act (IMLA) of 1938, 25 U.S.C. § 396(a)-396(g) (2000). In addition, all leases of coal on Indian lands must comply as well with the Surface Mining Control and Reclamation Act of 1977 (“SMCRA”), 25 U.S.C. § 1201 (2000) and regulations promulgated at 30 C.F.R. pt. 750 (2004).

99. *Navajo Nation*, 537 U.S. at 501 (citing 46 Fed. Cl. 217 (2000)).

The court of appeals for the Federal Circuit reversed the Court of Federal Claims, finding that the government's liability to the Tribe turned on whether "the United States controls the Indian resources." The Court of Appeals determined that the measure of control the Secretary exercised over the leasing of Indian lands for mineral development sufficed to warrant a money judgment against the United States for breaches of fiduciary duties connected to coal leasing. The appeals court agreed with the Federal Claims Court that the Secretary "favored Peabody interests to the detriment of Navajo interests."¹⁰⁰

The Supreme Court ultimately ruled against the Navajo Nation, holding that "to state a litigable claim, a tribal plaintiff must invoke a rights-creating source of substantive law that 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'"¹⁰¹ Justice Ginsberg's majority opinion implied that the Government has a lesser trust responsibility where the tribe assumes more control over decision-making concerning its resources. "The IMLA aims to enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating mining leases with third parties. (Citation omitted.) As the Court of Federal Claims recognized, 'the ideal of Indian self-determination is directly at odds with Secretarial control over leasing.'"¹⁰²

Justice Souter's dissenting opinion, joined by Justice Stevens and Justice O'Connor, suggested that the Tribe's theoretical control was something of an illusion.

What is more, the Tribe has made a powerful showing that the Secretary knew perfectly well how his own intervention on behalf of Peabody had derailed the lease adjustment proceeding that would in all probability have yielded the 20 percent rate. After his *ex parte* meeting with Peabody's representatives, the Secretary put his name on the memorandum, drafted by Peabody, directing Deputy Assistant Secretary Fritz to withhold his decision affirming the 20 percent rate; directing him to mislead the Tribe by telling it that no decision on the merits of the adjustment was imminent, when in fact the affirmance had been prepared for Fritz's signature; and directing him to encourage the Tribe to shift its attention from the Area Director's appealed award of 20 percent and return to the negotiating table, where 20 percent was never even a possibility. App. 117-118. The purpose and predictable effect of these actions was to induce the Tribe to take a deep discount

100. *Id.* (citing 263 F.3d 1325, 1329-32 (2001)).

101. *Id.* at 503 (quoting *U.S. v. Mitchell*, 463 U.S. 206, 218 (1983)).

102. *Id.* at 508 (quoting 46 Fed. Cl. 217, 230 (2000)).

in the royalty rate in the face of what the Tribe feared would otherwise be prolonged revenue loss and uncertainty. The point of this evidence is not that the Secretary violated some rule of procedure for administrative appeals, *ante*, at 21-22, or some statutory duty regarding royalty adjustments under the terms of the earlier lease. What these facts support is the Tribe's claim that the Secretary defaulted on his fiduciary responsibility to withhold approval of an inadequate lease accepted by the Tribe while under a disadvantage the Secretary himself had intentionally imposed.¹⁰³

The majority did not completely close the door on the trust responsibility, leaving open the question of liability for breach of trust where the pertinent regulations impose more specific duties.

We rule only on the Government's role in the coal leasing process under the IMLA. As earlier recounted, see *supra*, at 2-3, both the IMLA and its implementing regulations address oil and gas leases in considerably more detail than coal leases. Whether the Secretary has fiduciary or other obligations, enforceable in an action for money damages, with respect to oil and gas leases is not before us.¹⁰⁴

Nevertheless, the Supreme Court's decision in *United States v. Navajo Nation*¹⁰⁵ has caused a good deal of concern over the future of the federal trust doctrine. Professor Raymond Cross has written a particularly alarming article concerning the Court's apparent suggestion that the federal trust responsibility may be incompatible with Indian Self-Determination.¹⁰⁶ Professor Mary Christina Wood had earlier proposed an alternative paradigm that seeks to harmonize the two, arguing that the federal trust duty should be seen as encompassing a sovereign trust in favor of Indian Self-Determination.¹⁰⁷

Whereas recent litigation has dealt with enforcement of the federal trust responsibility for management of trust resources, questions linger regarding the extent of such a responsibility with respect to issues of tribal sovereignty and the overall welfare of tribal members. Congress routinely acknowledges a trust responsibility for management of Indian

103. *Id.* at 520 (Souter, J., dissenting).

104. *Id.* at 507, n.11.

105. *Id.* at 508.

106. Raymond Cross, *The Federal Trust Duty in an Age of Indian Self-Determination: An Epitaph for a Dying Doctrine?*, 39 TULSA L. REV. 369 (2003).

107. Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, UTAH L. REV. 109, 139-49 (1995).

lands, such as in the American Indian Agricultural Resource Management Act (“the United States has a trust responsibility to protect, conserve, utilize and manage Indian agricultural lands consistent with its fiduciary obligation and its unique relationship with Indian tribes”),¹⁰⁸ and Indian funds, as in the American Indian Trust Fund Management Reform Act (“consistent with the trust responsibility of the United States”).¹⁰⁹

Explicit reference to the trust responsibility is contained as well in such statutes as the Indian Tribal Justice Act (“the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government.”);¹¹⁰ the Native American Housing Assistance and Self-Determination Act (“the Congress, through treaties, statutes, and the general course of dealing with Indian tribes, has assumed a trust responsibility for the protection and preservation of Indian tribes and for working with tribes and their members to improve their housing conditions and socioeconomic status”);¹¹¹ and the Higher Education Tribal Grant Authorization Act (“these services are part of the Federal Government’s continuing trust responsibility to provide education services to American Indian and Alaska Natives.”).¹¹²

Other statutes appear to reference the trust responsibility without using the word “trust,” for example: The Indian Health Care Improvement Act (“special responsibilities and legal obligations to the American Indian people”);¹¹³ the Indian Self-Determination and Education Assistance Act (“the Federal Government’s historical and special legal relationship with, and resulting responsibilities to, American Indian people”);¹¹⁴ the Indian Child Welfare Act (“the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people”).¹¹⁵ Similar language is contained in the Indian Alcohol and Substance Abuse Prevention and Treatment Act,¹¹⁶ the Tribally Controlled Schools Act of 1988,¹¹⁷ and the Indian Child Protection and Family Violence Prevention

108. 25 U.S.C. § 3701 (2000). *See also* The National Indian Forest Resources Management Act, 25 U.S.C. § 3101(2) (2000) (“[T]he United States has a trust responsibility toward Indian forest lands . . .”).

109. 25 U.S.C. § 4021 (2000).

110. § 3601(2).

111. § 4101(4).

112. § 3302(7).

113. § 1602(a).

114. § 450(a).

115. § 1901.

116. § 2401(1).

117. § 2501.

Act.¹¹⁸

The existence of the trust responsibility with respect to these various duties and programs is not in doubt, yet it is far from clear whether each of these laws may be enforced either by suits for damages or injunctive relief. Presumably, entitlement to damages would depend upon a court finding that the substantive law “can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.”¹¹⁹ Injunctive relief may require a lesser standard.¹²⁰

III. BIA DECISION-MAKING, RECORDS AND APPEALS

A. *Administrative Appeals*

Although carried out within the confines of policies established in Washington, the vast majority of BIA decisions and actions that directly affect tribes and tribal members are made every day on Indian reservations throughout the nation. Authority to make appealable decisions rests not with BIA social workers, educators, or realty officers, but normally with an Agency Superintendent, or, in smaller Field Offices, with Field Representatives. No decision is final for the DOI for purposes of administrative review under the Administrative Procedures Act (“APA”)¹²¹ so long as it is subject to appeal to superior authority in the Department.¹²² BIA decisions must include written notice to all interested parties and, unless final for the Department, must include notice of the right to appeal.¹²³ BIA decisions are effective when the time for filing a notice of appeal has expired and no appeal has been filed.¹²⁴

In appeals of actions of persons under the Regional Director’s authority, the Regional Director must issue a written decision within

118. § 3201(a).

119. *United States v. Navajo Nation*, 537 U.S. 488, 503 (quoting *United States v. Mitchell*, 463 U.S. 206, 218 (1983)).

120. *See, e.g., Morton v. Ruiz*, 415 U.S. 199, 236 (1974) (trust responsibility requires fair treatment of Indians with respect to general assistance, provided pursuant to the Snyder Act, 25 U.S.C. § 13 (2000)); *McNabb v. Bowen*, 829 F.2d 787, 793 (9th Cir. 1997) (interpreting the Indian Health Care Improvement Act, 25 U.S.C. § 1601 (2000), the court held that for the Indian Health Service to refuse to pay for medical care for an Indian child, when the State would not, was “inconsistent with the trust doctrine.”). Professor Wood argues that effective protection of tribal lands may depend more upon common law injunctive relief, rather than seeking damages for federal mismanagement of tribal lands. Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims Of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355 (2003).

121. 5 U.S.C. § 704 (2000).

122. *See* 25 C.F.R. § 2.6(a) (2004).

123. *See* § 2.7.

124. *See* § 2.6(b).

sixty days after the time for all pleadings has expired.¹²⁵ Within thirty days of receipt of the Regional Director's decision, an interested party may appeal the decision to the Interior Board of Indian Appeals ("IBIA"). A copy of such an appeal must be sent to the Assistant Secretary–Indian Affairs, who may assume jurisdiction of the appeal within fifteen days of its receipt and issue a decision that is final for the Department. Decisions of the Assistant Secretary are immediately final unless the decision provides otherwise.¹²⁶

Notice of appeal must be filed with the official whose decision is being appealed, with copies sent to the officer who will hear the appeal and to all interested parties.¹²⁷ A statement of reasons for the appeal must be filed within thirty days after filing the notice of appeal.¹²⁸ Any interested party may file a written answer within thirty days after receipt of the statement of reasons.¹²⁹ All documents filed in an appeal must be served on all interested parties by personal service or mail.¹³⁰ A document filed in the wrong office will be forwarded to the correct office, however no extension of time will be granted for the document to be filed in the correct office, unless the misdirection is the fault of the government.¹³¹ An official deciding an appeal may for good cause grant an extension of time for filing any document except the notice of appeal.¹³² Failure to timely file the notice of appeal will result in summary dismissal.¹³³

An interested party who believes he or she may suffer substantial financial loss as a direct result of the delay caused by an appeal may request that the appellant be required to post bond.¹³⁴ Appeals from inaction of officials of the BIA may be taken in the same manner if within ten days of a written request, the official fails to either make a decision or establish a reasonable date by which he or she will make a decision.¹³⁵

The Interior Board of Indian Appeals ("IBIA") is one of three appeals boards within the Appeals Division of the Department's Office of Hearings and Appeals ("OHA").¹³⁶ The IBIA exercises the authority

125. See § 2.19.

126. See § 2.6(c).

127. See § 2.9.

128. See § 2.10.

129. See § 2.11.

130. See § 2.12.

131. See § 2.13.

132. See § 2.16.

133. See § 2.17.

134. See § 2.5.

135. See § 2.8.

136. See 43 C.F.R. § 4.1 (2004).

of the Secretary to issue decisions in (1) appeals in Indian probate matters, (2) appeals from decisions of BIA officials, and (3) other matters pertaining to Indians which are referred to it by the Secretary.¹³⁷

The Interior Board of Land Appeals (“IBLA”) hears appeals from BIA decisions concerning the use and disposition of public lands, including mineral resources, and the conduct of surface coal mining.¹³⁸ The IBLA is involved in Indian resource issues in matters such as Indian mineral royalties,¹³⁹ Bureau of Land Management (“BLM”) decisions concerning Indian allotments,¹⁴⁰ Office of Surface Mining (“OSM”) decisions regarding reclamation of Indian lands,¹⁴¹ and other decisions concerning Alaskan Native lands.¹⁴²

The Interior Board of Contract Appeals (“IBCA”) hears appeals from decisions of BIA contracting officers concerning BIA procurement contracts,¹⁴³ including tribal contracts under the Indian Self-Determination and Education Assistance Act (“ISDEAA”).¹⁴⁴

General delegations of authority to each of the Boards are found in 43 C.F.R. Part 4. General regulations that apply to all of OHA, unless superceded by specific regulations of a particular component, are found in Subpart B. Specific rules applicable to the IBCA are in Subpart C; IBIA rules are in Subpart D; and IBLA rules are in Subparts E, J, and L. The OHA has a Hearings Division as well as an Appeals Division.¹⁴⁵

Once an appeal is made to the IBIA, the regulations at 43 C.F.R. Part 4 supercede those of 25 C.F.R. Part 2. In addition, some BIA programs have special appeals procedures, including procedures for establishing that an American Indian group exists as an Indian Tribe;¹⁴⁶ decisions to contract or not to contract with an Indian tribe under the ISDEAA;¹⁴⁷ decisions of Education Program officials, which are appealed not to the

137. See § 4.1(b)(2).

138. See § 4.1(b)(3).

139. 30 C.F.R. § 290.7 (2004); 43 C.F.R. § 4.330(b)(3) (2004).

140. 25 U.S.C. §§ 334, 336 (2004).

141. 43 C.F.R. § 4.1100-4.1296 (2004).

142. *E.g.*, 43 C.F.R. § 4.410(b) (2004).

143. *Id.* § 4.1(b)(1).

144. 25 U.S.C. § 450-450(n) (2004).

145. See 43 C.F.R. § 4.1(a) (2004). The Hearings Division has Administrative Law Judges (ALJ’s) located throughout the country, who hear all cases in which a hearing on the record is required by the APA, 5 U.S.C. § 554 (2004), including Indian probate cases. See 43 C.F.R. § 4.210-308 (2004). They also hear cases that are referred to them by one of the appeals boards, where the Board concludes a hearing is warranted. *Id.* § 4.1(a). The party requesting an evidentiary hearing must affirmatively show the existence of a controversy concerning a genuine issue of material fact, the resolution of which is necessary for a decision in the appeal. See, *e.g.*, *All Materials of Montana, Inc. v. Billings Area Dir.*, 21 IBIA 202, 212 (1992).

146. 25 C.F.R. § 83 (2004).

147. *Id.* § 900.150-176.

IBIA but to the Director of Education Programs then to the Assistant Secretary;¹⁴⁸ and decisions in tribal enrollment disputes and issues concerning an individual's degree of Indian blood, which are appealed to the Assistant Secretary.¹⁴⁹

Decisions of the OHA appeal boards since November 1, 1996 are reported on the Department's website.¹⁵⁰ Unfortunately, the Department is subject to an order of the United States District Court for the District of Columbia that limits its ability to utilize the Internet, due to a finding that inadequate Internet security measures put Indian trust assets at risk.¹⁵¹ A cursory review of reported OHA decisions shows that the vast majority of appeals from decisions of BIA officials are to the IBIA, rather than to the IBLA or IBCA. Unfortunately, IBIA review of cases regularly takes up to two years, or more, except for those that can be summarily decided (e.g. dismissals),¹⁵² and those subject to regulatory timetables requiring expedited consideration (i.e. certain ISDEA appeals). Normally, BIA decisions become effective only when the time for filing an appeal has passed without such appeal being filed,¹⁵³ although the official to whom an appeal is made may declare that public safety, protection of trust resources, or other public exigency requires that the decision be made effective immediately.¹⁵⁴

In an appeal to the IBIA, the burden is on the appellant to show that a notice of appeal was timely mailed or delivered.¹⁵⁵ An untimely appeal cannot be cured by attempting to appeal on remand.¹⁵⁶ An appeal filed

148. *Id.* § 2.4(e).

149. *Id.* pt. 62.

150. <http://www.doi.gov/oha>. (The Office of Hearings and Appeals Web site is currently unavailable. Fortunately, OHA decisions are also available on the Westlaw and Lexis/Nexis databases. The Indian Law Reporter prints some Board decisions. The OHA also offers a subscription service.)

151. *Cobell v. Norton*, 274 F. Supp. 2d 111, 135 (D.D.C. 2003), superseded and replaced, by *Cobell v. Norton*, 310 F. Supp. 2d 77 (D.D.C. 2004).

152. 25 C.F.R. § 2.17.

153. *Id.* § 2.6(b).

154. *Id.* § 2.6(a).

155. *See American Land Dev. Corp. v. Acting Phoenix Area Dir.*, 25 IBIA 120, 125, *recon. denied*, 25 IBIA 197 (1994); *see also*, *Howard Crow Flies High v. Rocky Mountain Reg'l Dir.*, 38 IBIA 3 (2002).

156. In *Jackson County, Kansas, v. Acting S. Plains Reg'l Dir.*, 38 IBIA 6 (2002), the Board affirmed the decision of the Regional Director to take a tract of land into trust for the Prairie Band of Potawatomi Indians (Tribe). The Regional Director's decision was issued following the Board's remand in *Kansas v. Acting S. Plains Reg'l Dir.*, 36 IBIA 152 (2001), wherein the Board expressed concern that the Regional Director had alluded to pending regulations (although he properly based his decision on regulations then in effect). Appellant Jackson County, Kansas, filed a second notice of appeal which sought review of the decision at issue here, as well as a different decision concerning another tract of land. Appellant's second appeal was dismissed as untimely. *Jackson County, Kansas v. Acting S. Plains Reg. Dir.*, 37 IBIA 68 (2001). The State of Kansas appealed both of the decisions. Its appeals were dismissed as untimely. *Kansas v. Acting S. Plains Reg'l Dir.*, 37

more than thirty days after notice of the decision will be dismissed as untimely, even where it is related to an ongoing dispute.¹⁵⁷ “Even where appellant has not received the Board’s order, that fact would not constitute extraordinary circumstances warranting reconsideration.”¹⁵⁸ A third party may request to appear as *amicus curiae* before the IBIA.¹⁵⁹

The IBIA lacks jurisdiction to review decisions made by the Assistant Secretary–Indian Affairs, except where a matter is specially referred to the Board by the Secretary or the Assistant Secretary or where a right of review is established by regulation.¹⁶⁰ Just as it lacks authority to review decisions made by the Assistant Secretary, the Board also lacks authority to review inaction by the Assistant Secretary.¹⁶¹ The IBIA also lacks jurisdiction to review a BIA decision when a program regulation makes that decision final for the Department.¹⁶²

The IBIA has stated on numerous occasions that it is not a court of general jurisdiction, but instead has only that authority delegated to it by the Secretary of the Interior.¹⁶³ Although frequently requested by appellants, the IBIA has not been delegated authority to declare a duly promulgated Departmental regulation invalid.¹⁶⁴ The Board has no authority to waive Departmental regulations.¹⁶⁵ The Board may,

IBIA 61, *recon. denied*, 37 IBIA 67 (2001).

157. In *Rocky Crossing Ranch Co. & Sam J. Bitz v. Rocky Mountain Reg’l Dir.*, 38 IBIA 1 (2002), the Board dismissed an appeal from a decision concerning plans for removal of stockpiled gravel from property in which Appellant owned the surface estate. The Board held in an earlier appeal concerning the same property that gravel underlying the surface estate was owned by the Chippewa Cree Tribe of the Rocky Boy’s Reservation. *Bitz v. Acting Billings Area Dir.*, 23 IBIA 286 (1993), *recon. denied*, 24 IBIA 10 (1993).

158. *Louis W. Ballard v. Acting E. Oklahoma Reg’l Dir.*, Bureau of Indian Affairs, 35 IBIA 255 (2000).

159. 43 C.F.R. § 4.3(c) (2004).

160. § 4.331(b); *see, e.g.*, *Scotts Valley Band of Pomo Indians v. Assistant Sec’y–Indian Affairs*, 35 IBIA 89 (2000), and cases cited therein.

161. *Miller v. Bureau of Indian Affairs*, 32 IBIA 294 (1998), *recon. denied*, 33 IBIA 60 (1998).

162. *Stogsdill v. S. Plains Reg’l Dir.*, 35 IBIA 157 (2000) (interpreting 25 C.F.R. § 62.10(a) (2004) concerning adverse enrollment decisions); *Welch v. Minneapolis Area Dir.*, 17 IBIA 56 (1989) (interpreting 25 C.F.R. § 88.1(c) (2004) in regard to decisions approving, disapproving, or conditionally approving attorney contracts); *Split Family Support Group v. Northwest Reg’l Dir.*, 36 IBIA 5 (2001) (interpreting 25 C.F.R. § 82.10(b) (2004) concerning adequacy of petition for Secretarial election).

163. *See, e.g.*, *Dailey v. Billings Area Dir.*, 34 IBIA 128, 129 (1999), and cases cited therein.

164. *See, e.g.*, *Shoshone-Bannock Tribes v. Portland Area Dir.*, 35 IBIA 242, 247 (2000), and cases cited therein; *Debra Louriero v. Acting Pac. Reg’l Dir.*, 37 IBIA 158 (2002) (Board cannot disregard regulation that limits burial assistance to members of federally-recognized tribes as violative of the Snyder Act, 25 U.S.C. § 13); *Tanana Chiefs Conference, Inc. v. Acting Assoc. Alaska State Dir.*, Bureau of Land Mgmt., 33 IBIA 51, 53 (1998), and cases cited therein; *Hannahville Indian Cmty. v. Minneapolis Area Educ. Officer*, 34 IBIA 4, 10 (1999).

165. *Ballard v. Acting E. Okla. Reg’l Dir.*, 35 IBIA 255 (2000). Nor will the IBIA hear arguments raised for the first time in a reply brief. *See Thomas E. Edwards v. Portland Area Dir.*, 29 IBIA 12, 15 (1995).

however, refer a request for a waiver of the regulations to the Assistant Secretary–Indian Affairs.¹⁶⁶

The OHA, as an Executive Branch agency, has no authority to declare an act of Congress unconstitutional.¹⁶⁷ Because they only have that authority delegated to them by the Secretary, the boards normally have no authority to review decisions of the Assistant Secretary¹⁶⁸ or to award money damages against the BIA.¹⁶⁹ The IBIA may not substitute its judgment for that of the BIA in a matter that involves the exercise of discretion,¹⁷⁰ although the IBIA may review for abuse of discretion.¹⁷¹ An appellant who challenges a BIA discretionary decision bears the burden of proving that the BIA did not properly exercise its discretion.¹⁷²

The IBIA has repeatedly stated that it lacks authority to issue advisory opinions.¹⁷³ An appellant who fails to make any allegation of error in the decision under appeal, let alone any argument in support of such an allegation, has not carried its burden of proof.¹⁷⁴ The Board will not consider arguments or evidence presented for the first time on appeal.¹⁷⁵ If Appellant believes it is entitled to an award of costs or attorney fees under any law, it may submit an application for such an award, identifying the law it believes is applicable.¹⁷⁶

166. *Cheyenne River Sioux Tribe v. Great Plains Reg'l Dir.*, 35 IBIA 281 (2000) (minimum acceptable reservation rental rate for grazing).

167. *See, e.g.*, *Estate of Annie Greencrow Whitehorse*, 27 IBIA 136 (1995); *Kansas v. Acting S. Plains Reg'l Dir.*, 36 IBIA 152, 154 (2001), and cases cited therein.

168. 25 C.F.R. § 2.6(c) (2004); *see also* § 2.4(e).

169. *Dailey v. Billings Area Dir.*, 34 IBIA 128 (1999).

170. 43 C.F.R. § 4.330(b) (2004) provides: "Except as otherwise permitted by the Secretary or the Assistant Secretary–Indian Affairs by special delegation or request, the Board shall not adjudicate: . . . (2) Matters decided by the Bureau of Indian Affairs through exercise of its discretionary authority."

171. *See, e.g.*, *Town of Charlestown, Rhode Island v. E. Area Dir.*, 35 IBIA 93, 96 (2000), and cases cited therein.

172. *E.g., id.*

173. *Narconon Chilocco New Life Ctr. v. Superintendent, Pawnee Agency*, 29 IBIA 234 (1996); *Umpqua Watersheds, Inc., v. Northwest Reg'l Dir.*, 38 IBIA 10 (2002) (Federal court litigation involved some or all of the same issues and parties, and Appellants sought Board's rulings on their standing to challenge timber sales and on BIA procedures under the National Environmental Policy Act, for purposes of future timber sales).

174. *E.g.*, *OK Tank Trucks, Inc. v. Acting Muskogee Area Dir.*, 33 IBIA 119 (1999), and cases cited therein.

175. *E.g.*, *Shoshone-Bannock Tribal Credit Program v. Portland Area Dir.*, 35 IBIA 110, 114-15 (2000); *Welk Park North v. Acting Sacramento Area Dir.*, 29 IBIA 213, 219 (1996), and cases cited therein.

176. The Department's regulations implementing the Equal Access to Justice Act are at 43 C.F.R. § 4.601-4.619 (2004). *See Abbott v. Billings Area Dir.*, 21 IBIA 137 (1992), and *Utu Utu Gwaitu Paiute Tribe v. Sacramento Area Dir.*, 17 IBIA 141 (1989), construing the regulations. An applicant may receive fees unless the Department's position was substantially justified or special circumstances make the award unjust. No presumption arises that the Department's position was not substantially justified simply because the Department did not prevail. An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding. The application must

To correct prior error, an official of the BIA may change an administrative interpretation of a statute as long as the reason for the change is clearly set forth and the departure from the prior administrative position is not arbitrary or capricious.¹⁷⁷ Appellants have unsuccessfully sought to estop the Department in such situations.¹⁷⁸ Estoppel will not run against the Government when it acts as trustee for Indians.¹⁷⁹ The six-year statute of limitations for the commencement by the United States of civil actions for money damages¹⁸⁰ does not limit administrative action within the Department.¹⁸¹

B. BIA Records

The DOI has established a national repository for the consolidated non-active records of the BIA and the OST. The American Indian Records Repository is located at the National Archives and Records Administration facility in Lenexa, Kansas. Haskell Indian Nations University, a BIA-operated post-secondary school located in Lawrence, Kansas, has simultaneously established an archival records management studies program to train and certify Indian students.¹⁸²

Although the BIA makes daily decisions affecting not only Indians and their property interests, but also many non-Indians, BIA records—like

itemize the amount of fees, which are limited to no more than \$75 per hour and expenses for which an award is sought. Where a court reviews the decision on the merits in an adversary adjudication, the court shall make any award for the administrative stage as well as the judicial review stage of the proceeding. 5 U.S.C. § 504(c)(1) (2000). *See also* 28 U.S.C. § 2412 (2000). EAJA limits attorney fees to no more than \$125 unless special factors justify a higher rate. For administrative proceedings, agencies must make any determination that special factors justify a higher rate by regulation. 5 U.S.C. § 504(a)(b)(1)(A)(ii) (2000).

177. *See* Naegele Outdoor Adver. Co. v. Acting Sacramento Area Dir., IBIA 92-211-A (1993); Hopi Indian Tribe v. Director, Office of Trust and Econ. Dev., 22 IBIA 10, 16 (1992); Noyo River Indian Cmty. v. Acting Sacramento Area Dir., 19 IBIA 63, 67 n.10 (1990); Kiowa, Comanche & Apache Intertribal Land Use Comm. v. Deputy Assistant Sec’y—Indian Affairs (Operations), 14 IBIA 207, 214 (1986); Bonaparte v. Comm’r of Indian Affairs, 9 IBIA 115 (1981).

178. *See e.g.*, Naegele Outdoor Adver. Co. v. Acting Sacramento Area Dir., IBIA 92-211-A (1993); Bradshaw v. Acting Muskogee Area Dir., 18 IBIA 339, 343-44 (1990); Falcon Lake Properties v. Assistant Sec’y—Indian Affairs, 15 IBIA 286, 298 (1987); Linmar Petroleum Co., 153 IBLA 99 (2000) (A claim of estoppel against the United States will be rejected in the absence of affirmative misconduct in the nature of an erroneous statement of fact in an official written decision or if the effect of allowing the estoppel would be to grant a right not authorized by law; reliance on incomplete or inaccurate information provided by Federal employees cannot create any rights not authorized by law.).

179. *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 334 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957).

180. 28 U.S.C. § 2415(a) (1994).

181. *Union Texas Petroleum Energy Corp.*, 153 IBLA 170 (2000).

182. *See* DOI, *American Indian Records Repository Dedicated*, PEOPLE, LAND & WATER, at 45 (August, 2004) (the publication is a monthly employee news magazine produced by the Secretary’s Office of Communications).

those of other federal agencies—are not always open to public review. The Privacy Act generally prohibits federal agencies from disclosing any record which is contained in a system of records, unless otherwise authorized.¹⁸³ Authorization may be found in the Freedom of Information Act (“FOIA”), which mandates broad disclosure of government documents, except for certain exempt categories of information.¹⁸⁴

The BIA sometimes withholds records involving Indian trust property pursuant to Exemption Four, “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”¹⁸⁵ For example, the Tenth Circuit Court of Appeals upheld the BIA’s refusal to release information related to a lease of Indian lands for storage of approximately 40,000 tons of spent nuclear fuel, on the basis of evidence demonstrating the existence of potential economic harm.¹⁸⁶

The BIA may also withhold records pursuant to Exemption Three to FOIA, which exempts information that is exempted from disclosure by another federal statute.¹⁸⁷ For example, BIA has successfully relied on Exemption Three with reference to the Archeological Resources Protection Act of 1979 (“ARPA”),¹⁸⁸ which generally prohibits the disclosure of information concerning the nature and location of archeological resources.¹⁸⁹

A “trustee is under a duty to the beneficiary not to disclose to a third person information which he has acquired as trustee where he should know that the effect of such disclosure would be detrimental to the interest of the beneficiary.”¹⁹⁰ Nevertheless, the Supreme Court has declined to recognize an “Indian trust responsibility” exception to the FOIA, at least in the context of Exemption Five for intra-agency communications.

The Department does not attempt to argue that Congress specifically envisioned that Exemption 5 would cover communications pursuant to

183. See 5 U.S.C. § 552(b) (2000).

184. FOIA exempts from the disclosure requirement the following types of information: classified information, internal administrative matters, information exempt by statute, confidential commercial data, “privileged” information, personnel and medical files, law enforcement information, bank records, and data concerning wells. *Id.*

185. 5 U.S.C. § 552(b)(4) (2000).

186. *Utah v. United States*, 256 F.3d 967 (10th Cir. 2001). In a separate action, the Court also ruled that federal law preempts state laws aimed at blocking the controversial facility. *Skull Valley Band of Goshute Indians v. Nielson*, No. 02-4149 (10th Cir. 2004).

187. 5 U.S.C. § 552(b)(3) (2000).

188. 16 U.S.C. § 470(aa) (2000).

189. *Starkey v. United States*, 238 F. Supp. 2d 1188 (S.D. Cal. 2002).

190. RESTATEMENT (SECOND) OF TRUSTS § 170 cmt. s (1957).

the Indian trust responsibility, or any other trust responsibility. Although as a general rule we are hesitant to construe statutes in light of legislative inaction, see *Bob Jones Univ. v. United States*, 461 U.S. 574, 600, 76 L. Ed. 2d 157, 103 S. Ct. 2017 (1983), we note that Congress has twice considered specific proposals to protect Indian trust information, see Indian Amendment to Freedom of Information Act: Hearings on S. 2652 before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 94th Cong., 2d Sess. (1976); Indian Trust Information Protection Act of 1978, S. 2773, 95th Cong., 2d Sess. (1978). We do so because these proposals confirm the commonsense reading that we give Exemption 5 today, as well as to emphasize that nobody in the Federal Government should be surprised by this reading.¹⁹¹

Congress has specified certain types of Indian land ownership information that must be released to certain types of requesters. The Indian Land Consolidation Act (“ILCA”)¹⁹² provides that the BIA shall make available certain information about Indian landowners to certain categorical requesters, including other Indian owners of interests in trust or restricted lands within the same reservation; the tribe that exercises jurisdiction over the land; and prospective applicants for the leasing, use, or consolidation of interests in trust or restricted lands. FOIA and Privacy Act regulations applicable to BIA are found at 43 C.F.R. Part 2. When BIA contracts with an Indian tribe or any other party to accomplish a Department function and the contract provides for the operation of a system of records, the contract must also require the contractor to comply with the Department’s Privacy Act regulations.¹⁹³ The regulations provide for administrative appeal of a records denial by the BIA.¹⁹⁴

C. APA Review

The United States is immune from suit absent its express consent.¹⁹⁵ The APA waives the sovereign immunity of the United States with respect to non-monetary claims to provide for judicial review of “final

191. *Dep’t of The Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 16 n.7 (2001).

192. 25 U.S.C. § 2201 (2000).

193. 43 C.F.R. § 2.53 (2004).

194. Appeals are addressed to the Freedom of Information Act Appeals Officer, Office of Information Resource Management, U.S. Department of the Interior, MS-5312-MIB, 1849 “C” Street, N.W., Washington, DC, 20240.

195. *See United States v. Mitchell*, 445 U.S. 535, 539 (1983) (“A waiver of sovereign immunity cannot be implied but must be unequivocally expressed.”) (internal quotations and citation omitted).

agency action.”¹⁹⁶ The APA does not permit judicial review where a statute expressly or implicitly precludes review.¹⁹⁷ Nor does the APA authorize judicial review of “agency actions committed to agency discretion by law.”¹⁹⁸

A jurisdictional barrier that frequently confronts those seeking judicial review of BIA administrative action is Rule 19 of the Federal Rules of Civil Procedure, which requires dismissal of an action where a necessary and indispensable party cannot be joined. Many BIA decisions affect one or more Indian tribes, who normally cannot be joined without their consent due to sovereign immunity. Accordingly, a Court is without subject matter jurisdiction pursuant to Rule 12(b)(7) of the Federal Rules of Civil Procedure, and the complaint should be dismissed.¹⁹⁹ However, a tribe will not be found to be indispensable in every case in which its interests are affected.²⁰⁰

IV. TRIBAL GOVERNMENT

A. *Federal Recognition of Indian Tribes*

The United States maintains government-to-government relationships with 562 Indian tribes.²⁰¹ Although only fourteen states are without federally recognized tribes, the tribes are concentrated primarily in the West. Absent federal recognition, a tribe could not exercise

196. 5 U.S.C. § 704 (2000).

197. § 701(a)(1).

198. § 701(a)(2).

199. *See, e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978); *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510-12 (1991); *Enter. Mgmt., Inc. v. United States*, 883 F.2d 890, 893-94 (10th Cir. 1989); *Kiowa Tribe of Oklahoma v. Mfr. Tech., Inc.*, 523 U.S. 751 (1998); *Nero v. Cherokee Nation*, 892 F.2d 1457, 1461 (10th Cir. 1987); *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 777 n. 13 (D.C. Cir. 1986).

200. *E.g.*, *Sac and Fox Nation of Mo. v. Norton*, 240 F.3d 1250 (10th Cir. 2001) (challenge to a decision accepting lands in trust for tribe did not require joinder of tribe where BIA was defending its own decision to accept the land and the tribe’s position was virtually identical to the BIA’s position).

201. *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 68 FR 68180 (Dec. 5, 2003). The BIA annually publishes a list of such tribes pursuant to section 104 of the Act of Nov. 2, 1994 (Pub. L. 103-454; 108 Stat. 4791, 4792), 25 U.S.C. § 479(a-1) (2000). There are over 200 federally recognized tribes in Alaska; over 100 in California; 37 in Oklahoma; 28 in Washington State; 24 in Nevada; 22 in New Mexico; 20 in Arizona; 12 each in Minnesota and Michigan; 11 in Wisconsin; 9 in Oregon; 8 in South Dakota; 7 each in Montana and New York; 5 each in Idaho, North Dakota and Maine; 4 each in Utah, Kansas, Nebraska and Louisiana; 3 in Texas; 2 each in Wyoming, Colorado, Florida, Connecticut and Delaware; and 1 each in Iowa, Missouri, Mississippi, Alabama, South Carolina, North Carolina, Rhode Island, Massachusetts, and Vermont. There are no recognized tribes in Illinois, Indiana, Ohio, Kentucky, Tennessee, West Virginia, Virginia, Pennsylvania, New Hampshire, Maryland, Arkansas, Georgia, New Jersey, or Hawaii. *Id.*

sovereign powers or receive services from the BIA, as described herein.

The United States Constitution grants Congress the power “to regulate Commerce . . . with the Indian Tribes.”²⁰² Under long-standing precedent, the Supreme Court generally defers to a determination by the Congress or the Executive branch that a tribe exists.²⁰³ Federal recognition historically resulted from a course of dealing over time, a treaty, a statute, or executive order. Although Congress terminated recognition by treaty in 1871, it still may extend recognition to a particular tribe through special legislation.²⁰⁴

Nevertheless, most groups seeking federal recognition today face a daunting administrative procedure. Until 1978, the BIA made tribal recognition decisions on a case-by-case basis, when it established a formal regulatory process for recognizing tribes.²⁰⁵ Now, BIA will grant recognition only to a petitioner who can meet a series of difficult tests: that it has been identified as an American Indian entity on a substantially continuous basis since 1900; that it has existed as a historically distinct community from historical times to the present; that it has maintained political influence or authority over its members from historical times to the present; that it maintains governing documents or procedures, including membership criteria; that its membership descends from a historical Indian tribe that functioned as a political entity; that its members are not members of any other tribe; and that it has not been the subject of congressional legislation expressly terminating the Federal relationship.²⁰⁶

Before implementing the current recognition regulations, the BIA had received forty petitions from groups seeking formal tribal recognition. Since 1978, BIA has received an additional 254 petitions. As of February, 2004, a total of 57 petitions had been resolved, 13 petitions were ready for dispensation, 9 petitions were in active status, 2 in post-final decision appeals, 1 in litigation, and 213 were not yet ready

202. U.S. CONST. art. I, § 8, cl. 3.

203. *See, e.g.*, *United States v. Rickert*, 188 U.S. 432, 445 (1903); *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419(1866). The only limitation on Congressional power to define tribal status is that it not be exercised arbitrarily. *See United States v. Sandoval*, 231 U.S. 28, 46 (1913).

204. *See, e.g.*, Ponca Restoration Act of October 31, 1990, Pub. L. No. 101-484, 25 U.S.C. § 983-983(h) (2000) (Federal recognition of the Tribe had been terminated by the Act of September 5, 1962, Pub. L. No. 87-629, 25 U.S.C. §§ 971-980 (2000).).

205. 25 C.F.R. pt. 83 (2004).

206. *Id.* pt. 83.7. The BIA’s Office of Federal Acknowledgment has compiled over 600 MB of documents for dozens of groups that have made it through the federal recognition process. Initially, the BIA planned to post the recognition compilation online but still hasn’t received approval to restart its web site. To make it more accessible, Indianz.Com converted the database to a web page at <http://64.62.196.98/adc/adc.html>. *See* BIA recognition decision database now online, Indianz.com, July 16, 2004, at <http://www.indianz.com/News/2004/003428.asp>.

for evaluation.²⁰⁷ The glacial pace of the recognition process, combined with the high stakes and strong feelings associated with such decisions, have led to accusations of corruption and proposals to change the system.²⁰⁸

Tribal recognition presents unique issues in several parts of the country. The BIA has extended federal recognition to more than 200 Alaska Native organizations as Indian tribes,²⁰⁹ however, Alaska Native groups have limited authority to govern Indian lands as “Indian country.”²¹⁰ Nevertheless, Congress has included Alaska native villages and corporations as the equivalent of federally recognized Indian tribes in various legislation.²¹¹ The Alaska Inter-tribal Council is a statewide, tribally-governed non-profit organization that advocates on behalf of tribal governments throughout the state.²¹² The unique status of Indian lands in Alaska is discussed *infra*.

The United States has recognized no federal trust relationship with Native Hawaiians.²¹³ Nevertheless, Congress has endorsed a process that may end in the establishment of a government-to-government relationship with Native Hawaiians.²¹⁴ In 1993, Congress enacted a resolution extending an apology on behalf of the United States to Native Hawaiians for the illegal overthrow of the Native Hawaiian government 100 years earlier and calling for a reconciliation of the relationship

207. *Committee on Gov't Reform, U.S. House Rep., Hearing on the Process for Recognition by the Fed. Gov't of Am. Indian Tribes as Sovereign Indian Nations* (May 5, 2004) (opening statement of Chairman Tom Davis).

208. *E.g.*, S. 297, 108th Cong. (A bill to provide reforms and resources to the Bureau of Indian Affairs to improve the Federal acknowledgement process, and for other purposes, introduced Feb. 4, 2003, by Sen. Ben Nighthorse Campbell.).

209. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 68 Fed. Reg. 68180 (Dec. 5, 2003).

210. *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998). The only statutory reservation in Alaska is that established in 1891 for the Metlakatla Indians of the Annette Islands. 25 U.S.C. § 495 (2000). The Secretary of the Interior has established six more reservations under the authority of Indian Reorganization Act. 25 U.S.C. § 473(a) (Venetie, Karluck, Akutan, Diomede, Unalakleet, and Wales).

211. *E.g.*, Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450b(e) (2000); Tribally Controlled Community College or University Assistance Act of 1978, 25 U.S.C. § 1801(2) (2000); Indian Child Welfare Act, 25 U.S.C. § 1903(8) (2000).

212. *See* <http://www.aitc.org>.

213. *See Rice v. Cayetano*, 528 U.S. 495 (2000) (holding that Native Hawaiian class recognized under state law is not analogous to an Indian tribe, thus an electoral restriction based on Native Hawaiian ancestry violates due process because it uses ancestry as a racial definition and for a racial purpose). The Ninth Circuit has upheld Interior's exclusion of native Hawaiians from the federal acknowledgement regulations. *Kahawaiolaa v. Norton*, 386 F.3d 1271 (9th Cir. 2004).

214. *See* S. REP. NO.108-085 (2003), Committee on Indian Affairs, Expressing the Policy of the United States regarding the United States Relationship with Native Hawaiians and to Provide a Process for the Recognition by the United States of the Native Hawaiian Governing Entity, and for Other Purposes, June 27, 2003, available at <http://indian.senate.gov>.

between the United States and Native Hawaiians.²¹⁵

In December of 1999, the Departments of Interior and Justice initiated a process of reconciliation in response to the Apology Resolution, resulting in a report, entitled “From Mauka to Mauki: The River of Justice Must Flow Freely” (“Reconciliation Report”), issued on October 23, 2000. The principal recommendation contained in the Reconciliation Report is that the Native Hawaiian people should have self-determination over their own affairs within the framework of Federal law, as do Native American tribes.²¹⁶

In 1848, Mexico ceded to the United States more than 70 million acres in California, land to which the California Indians had aboriginal title.²¹⁷ Over the next few years, the United States negotiated 18 treaties with 139 California Indian groups.²¹⁸ The Senate refused to ratify the treaties, however, instead passing the California Land Claims Act of 1851, which effectively passed Indian aboriginal title into the public domain, except for lands occupied by certain bands of Mission Indians that had received Spanish land grants.²¹⁹ California Indians continued to receive sparse federal aid, including the purchase of small parcels of land in central and northern California that became known as the California Rancheria System.²²⁰

In the 1930s, many California tribes reorganized their tribal governments under the auspices of the IRA. The revival was short-lived, however, as the Rancheria Act of 1958 slated 41 California rancherias

215. Apology Resolution of 1993, Pub. L. No. 103-150, 107 Stat. 1510 (1993).

216. U.S. Department of the Interior and U.S. Department of Justice, from Mauka to Makai: The River of Justice Must Flow Freely: Draft Report on the Reconciliation Process between the Federal Government and Native Hawaiians 17 (Aug. 23, 2000).

217. Advisory Council on California Indian Policy, Final Reports and Recommendations to the Congress of the United States Pursuant to Public Law 102-416 (Sept. 1997) [hereinafter ACCIP Report], citing Bruce S. Flushman and Joe Barbieri, *Aboriginal Title: The Special Case of California*, 17 PAC. L.J. 391, 403 (1986). In 1992, Congress established the Advisory Council on California Indian Policy (“ACCIP”), which was directed to submit recommendations to Congress regarding remedial measures to address the special status problems of California’s terminated and unacknowledged tribes, and the needs of California Indians relating to economic self-sufficiency, health and education. Advisory Council on California Indian Policy Act of 1992, Pub. L. No. 102-416, 106 Stat. 2131 (1992), amended by Pub. L. No. 104-109 (1996). The ACCIP Report to Congress documents a tragic history of federal policy with respect to California Indians, resulting in “institutionalized injustice . . . which has evolved from state-sanctioned efforts to ‘exterminate’ the Indians, to federal policies that perpetuate various forms of economic and social oppression, deprivation of rights, and poverty within California’s Indian communities.” ACCIP Report, *supra* note 217, Executive Summary at 2.

218. ACCIP Report, *supra* note 217, Executive Summary at 2, citing Act of Sept. 30, 1850, 9 Stat. 519; 9 Stat. 558; the California Indian Act of 1850, 9 Stat. 572.

219. ACCIP Report, *supra* note 217, Executive Summary at 2, citing An Act to Ascertain and Settle the Land Claims in the State of California, 9 Stat. 631 (1851); ACCIP Recognition Report, at 11-12.

220. ACCIP Report, *supra* note 217, Executive Summary at 3; ACCIP Recognition Report at 13-14.

for termination of federal recognition. Eventually, most of the rancherias regained federal recognition, but another 40 tribes in California continue to be denied acknowledgement.²²¹

B. Tribal Constitutions

The Indian Reorganization Act of 1934 (“IRA”) authorized tribes to revitalize their tribal governments by adopting constitutions subject to the approval of both the tribal membership and of the Secretary of the Interior.²²² The IRA also permitted tribes to incorporate under a charter issued by the Secretary and approved by tribal members.²²³ BIA regulations govern Secretarial elections concerning tribal constitutions adopted pursuant to the IRA.²²⁴ The IRA requires only that tribal constitutions and bylaws adopted thereunder, or amendments thereto, obtain BIA approval; it does not require that tribal ordinances be made subject to BIA approval.²²⁵ The Supreme Court has noted that tribes with ordinance approval provisions in their constitutions “are free, with the backing of the Interior Department, to amend their constitutions to remove the requirement of Secretarial approval.”²²⁶ In a Secretarial election for tribal constitutional amendments under the IRA, the Seventh Circuit Court of Appeals distinguished a federal responsibility imposed upon the BIA by an Act of Congress, and a BIA responsibility undertaken as a matter of tribal law.²²⁷

At its base, this lawsuit is a challenge to the way certain federal officials administered an election for which they were both substantively and procedurally responsible. It bears emphasizing that Secretarial elections, such as the one at issue here, are federal—not tribal—elections. 25 C.F.R. § 81.1(s). Tribes are sovereign only to the extent that their sovereignty has not been qualified by statutes or

221. ACCIP Report, *supra* note 217, Executive Summary at 2-4; ACCIP Recognition Report at 15-22; ACCIP Termination Report at 6-34.

222. Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. § 476 (2000). The Native American Technical Corrections Act of 2004 amended the IRA to recognize that tribes retain inherent sovereign powers to adopt governing documents under procedures other than those specified in § 476. Some tribes have no constitution or other governing documents, choosing to be guided by “tradition.”

223. 25 U.S.C. § 477 (2000). Provisions similar to those in the IRA were adopted in 1936 to cover Oklahoma, Ch. 831, 49 Stat. 1967 (codified at 25 U.S.C. §§ 501-509 (2000)), and the Alaska Territory, Act of May 1, 1936, Ch. 254 § 1, 49 Stat. 1250 (codified at 25 U.S.C. § 473(a) (2000)).

224. 25 C.F.R. pts. 81, 82 (2004).

225. *Kerr-McGee v. Navajo Tribe*, 471 U.S. 195 (1985).

226. *Id.* at 199.

227. *Thomas v. United States*, 189 F.3d 662 (7th Cir. 1999).

treaties. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14, 94 L. Ed. 2d 10, 107 S. Ct. 971 (1987). The IRA explicitly reserves to the federal government the power to hold and approve the elections that adopt or alter tribal constitutions. 25 U.S.C. § 476.²²⁸

C. Tribal Resolutions and Elections

Where a tribe has given BIA formal authority to review tribal actions through its constitution or ordinances, that authority must be narrowly construed, and BIA review must be undertaken in such a way as to avoid unnecessary interference with the tribes' right to self-government.²²⁹ Intra-tribal disputes, including disputes concerning the validity of tribal council actions, should be resolved in tribal forums.²³⁰ The guiding principle of these IBIA decisions is the federal policy of respect for tribal self-government, which counsels that the federal government should refrain from interfering in intra-tribal disputes.²³¹

There are, however, some circumstances in which the BIA must act. The courts have recognized that "the DOI has the authority and responsibility to ensure that the Nation's representatives, with whom it must conduct government-to-government relations, are the valid representatives of the Nation as a whole."²³² The IBIA also recognizes that the BIA must at times intrude into intra-tribal disputes.

Both the Federal courts and the Board have recognized that there are times when, despite the lack of specific statutory authority, BIA must make determinations concerning intra-tribal disputes, most often those disputes involving tribal elections or the removal of tribal officials from office. BIA's authority to make these determinations derives from its responsibility to carry out the government-to-government relationship and its concomitant need to know whether a tribal governing body is properly constituted and therefore qualified to represent the tribe in

228. *Id.* at 667. *See also*, *Cheyenne River Sioux Tribe v. Andrus*, 566 F.2d 1085, 1088 (8th Cir. 1977); *Shakopee Mdewakanton Sioux (Dakota) Cmty. v. Babbitt*, 107 F.3d 667 (8th Cir. 1997).

229. *See, e.g.*, *Wells v. Acting Aberdeen Area Dir.*, 24 IBIA 142, 145 (1993); *Ute Indian Tribe of the Uintah and Ouray Reservation v. Phoenix Area Dir.*, 21 IBIA 24, 28 (1991).

230. *See, e.g.*, *Madison v. Acting Portland Area Dir.*, 33 IBIA 278 (1999).

231. *See* *Yeahquo, et al. v. S. Plains Reg'l Dir.*, 36 IBIA 11 (2001).

232. *The Seminole Nation of Okla. v. Norton*, 223 F. Supp. 2d 122, 140 (D.D.C. 2002) (upholding Department's refusal to recognize tribal officials elected in violation of tribal and federal laws); *see also* *Seminole Nation v. United States*, 316 U.S. 286 (1942) ("Payment of funds at the request of a tribal council which, to the knowledge of the Government officers charged with the administration of Indian affairs and the disbursement of funds to satisfy treaty obligations, was composed of representatives faithless to their own people and without integrity would be a clear breach of the Government's fiduciary obligation.") *Id.* at 297.

dealings with BIA. [*Citations omitted.*] Even in these circumstances, however, BIA must avoid unnecessary intrusions into tribal self-government.²³³

The IBIA also has held that, in cases where the BIA has authority to review a tribal action, it has the authority and the responsibility to review the tribal action for violations of the Indian Civil Rights Act of 1968 (“ICRA”),²³⁴ which applies most of the provisions of the Bill of Rights to tribal governments.²³⁵ However, the IBIA has also held that ICRA is not an independent grant of authority and does not authorize BIA to scrutinize tribal actions not otherwise properly within its jurisdiction.²³⁶

The IBIA has held that a valid tribal election held during the pendency of an appeal from a prior leadership dispute moots the earlier appeal.²³⁷ The Board has held on several occasions that individual tribal members lack standing to appeal a BIA action based on a personal assessment as to what is in the best interest of the tribe.²³⁸ Tribal remedies must normally be exhausted before a tribal member may seek relief from the IBIA.²³⁹

D. Tribal Membership

“Indian” is a term that has different meanings for different purposes. In the most common sense, the term implies that a person has some Indian blood, and is recognized as an Indian by the relevant community.²⁴⁰ However, an even broader definition is employed in the U.S. Census, where being “Indian” is a purely a matter of self-identification as part of a racial or ethnic group.²⁴¹ At the other extreme,

233. *Wells v. Acting Aberdeen Area Dir.*, 24 IBIA 142, 145 (1993). *See also* *Cahto Tribe v. Laytonville Rancheria v. Pac. Reg’l Dir.*, 38 IBIA 244, 248 (2002).

234. 25 U.S.C. § 1301 (2000).

235. *See, e.g.*, *Torres v. Acting Muskogee Area Director*, 34 IBIA 173 (1999); *Naylor v. Sacramento Area Director*, 23 IBIA 76 (1992); *Greendeer v. Minneapolis Area Director*, 22 IBIA 91 (1992).

236. *See, e.g.*, *Welmas v. Sacramento Area Dir.*, 24 IBIA 264, 272 (1993).

237. *See, e.g.*, *Rosales v. Sacramento Area Dir.*, 32 IBIA 158, 167 (1998); *Villegas v. Sacramento Area Dir.*, 24 IBIA 150 (1993).

238. *E.g.*, *Hunt v. Aberdeen Area Dir.*, 27 IBIA 173 (1995), and cases cited therein.

239. *E.g.*, *Wanatee v. Acting Minneapolis Area Dir.*, 31 IBIA 93 (1997).

240. *See* COHEN, *supra* note 4, at 2.

241. In the 2000 Census, nearly 2.5 million Americans identified themselves as American Indian or Alaska Native (about one percent of the population); another 1.6 million identified themselves as part American Indian or Alaska Native. UNITED STATES CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2000, (February 2002) [hereinafter CENSUS BUREAU, AI/AN POPULATION: 2000]. Between 1990 and 2000, the number of Americans claiming some Indian blood grew at a rate of 110%, compared to an increase of 13% in the overall United States population. *Id.* at 3. Two-thirds of this group reported being enrolled in or affiliated with a

as a matter of political status, to be considered an Indian one must be a member of a federally recognized Indian tribe.²⁴²

Normally, tribes retain complete control over their membership determinations.²⁴³ Several federal courts have held that the IRA does not confer jurisdiction to consider claims of improper membership determinations or election procedures.²⁴⁴ The Tenth Circuit Court of Appeals has found the tribal government to be indispensable in intra-tribal membership disputes on at least two occasions.

In *Davis ex rel Davis v. United States*,²⁴⁵ plaintiffs alleged the BIA wrongfully allowed the Seminole Nation of Oklahoma to deny to members of African ancestry certain benefits routinely provided to other members of the Tribe. Plaintiffs did not sue the Tribe itself but instead brought suit against the United States and various federal agencies and officials. Plaintiffs sought an order requiring the BIA to issue Certificates of Degree of Indian Blood (“CDIBs”) to members of the Plaintiff-bands. The district court dismissed the case for failure to join an indispensable party, the Seminole Nation.²⁴⁶ The Court of Appeals held that: (1) the district court did not abuse its discretion in determining that the Seminole Nation is an indispensable party with respect to the wrongful exclusion claim, and (2) the district court correctly ruled that it lacked jurisdiction to hear the CDIB claim because Plaintiffs failed to show that they had exhausted their administrative remedies.²⁴⁷

In a suit against the government seeking a change in federally

tribe, with the largest numbers by far identifying as Cherokee or Navajo. *Id.* at 8. Almost two-thirds reside in just eleven states, with almost half living in the Western United States. The states with the largest Native American populations, in descending order, are California, Oklahoma, Arizona, Texas, New Mexico, New York, Washington, North Carolina, Michigan, Alaska, and Florida. California and Oklahoma combined account for 25% of the total Native American population. *Id.* at 4.

242. See *supra* note 31; see also, e.g., *Epps v. Andrus*, 611 F.2d 915 (1st Cir. 1979); *United States v. Antoine*, 318 F.3d 919 (9th Cir. 2003). Professor Carole E. Goldberg asserts that “[m]ost contemporary scholars concerned with what may be called tribal revitalization - the strengthening of political and cultural sovereignty for Native nations - treat individual rights as an impediment to achieving that objective, not a positive tool.” Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889 (Fall 2003). She argues that “Federal courts should also refrain from making tribal jurisdiction turn on slavish adherence to the Bill of Rights, and should craft doctrines that end the excessive constitutionalizing of tribal members’ relationships to their nations.” *Id.* at 937-38.

243. See, e.g., *Montana v. U.S.*, 450 U.S. 544, 564 (1981); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978); *United States v. Wheeler*, 435 U.S. 313, 322 n.18 (1978); *Cherokee Inter-marriage Cases*, 203 U.S. 76 (1906); *Roff v. Burney*, 168 U.S. 218 (1897).

244. See *Boe v. Fort Belknap Indian Cmty.*, 642 F.2d 276, 279 (9th Cir. 1981); *Smith v. Babbitt*, 875 F. Supp. 1353, 1362-63 (D. Minn. 1995), *aff’d*, No. 95-1784, slip op. (8th Cir. Nov. 4, 1996).

245. 343 F.3d 1282 (10th Cir. 2003).

246. *Davis v. United States*, 199 F. Supp. 2d 1164 (W.D. Okla. 2002).

247. *Davis ex rel Davis v. United States*, 343 F.3d 1282, 1285 (10th Cir. 2003).

mandated membership for the Osage Tribe, the Tenth Circuit ruled that the Tribe itself is still an indispensable party.

Tribal Defendants were necessary parties whether this test is applied in relation to the relief requested by Individual Plaintiffs, the invalidation of the franchise restriction and what amounted to the revival of the tribal government under the 1881 Constitution, or in relation to the relief actually granted, the franchise extension and a new constitution and government. The relief requested in the second amended complaint posed a practical threat to the ability of Tribal Defendants to protect their interest as the sole governing body of the Tribe as well as to meet their obligations to protect the Osage mineral estate, while the actual results of the district court proceedings directly compromised those interests. Moreover, Tribal Defendants were indispensable because the case, essentially an internal tribal dispute, could not in equity and good conscience proceed in their absence, Fed. R. Civ. P. 19(b), in light of Tribal Defendants' interests. We have dismissed cases under Rule 19(b) when a tribe cannot be joined to a suit on account of sovereign immunity. (Citations omitted.)²⁴⁸

Congress has the power to determine tribal membership for federal administrative purposes and that definition of membership may differ from one established by the tribe itself.²⁴⁹ Congress normally exercises this power where federal recognition is restored to a tribe²⁵⁰ or to provide a basis for the distribution of judgment funds.²⁵¹ BIA regulations at 25 C.F.R. Part 61 govern the compilation of "Rolls of Indians" where federal statutes place that responsibility with the Secretary of the Interior.²⁵²

248. *Fletcher v. United States*, 116 F.3d 1315, 1333-34 (10th Cir. 1997).

249. *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84-86 (1977); *Wallace v. Adams*, 204 U.S. 415 (1907); *Simmons v. Eagle Seelatsee*, 244 F. Supp. 808 (E.D. Wash. 1965), *aff'd*, 384 U.S. 209 (1966).

250. *See, e.g.*, Coquille Restoration Act of June 28, 1989, Pub. L. No. 101-42 (codified as 25 U.S.C. § 715-715(g) (2000)).

251. *See, e.g.*, 25 U.S.C. § 1300d-3 (2000) (directing BIA to prepare a roll of the lineal descendants of the Sisseton and Wahpeton Mississippi Sioux Tribe, for purposes of Mississippi Sioux Tribes Judgment Fund Distribution Act of 1998).

252. 25 C.F.R. § 61.2.R (2004). The BIA enrollment regulations currently apply to the Pembina Band of Chippewa Indians, Act of December 31, 1982, Pub. L. 97-403, 96 Stat. 2022; Cherokee Band of Shawnee Indians, Act of December 20, 1982, Pub. L. 97-372, 96 Stat. 1815; Miami Indians of Indiana, Act of December 2, 1982, Pub. L. 97-376, 96 Stat. 1828; Cow Creek Band of Umpqua Tribe of Indians, Cow Creek Band of Umpqua Tribe of Indians Distribution of Judgment Funds Act of 1987, Pub. L. No. 100-139, 101 Stat. 823; Indians of the Hoopa Valley Indian Reservation, Hoopa-Yurok Settlement Act, Pub. L. No. 100-580, 102 Stat. 2924 (1988); Coquille Tribe of Indians, Coquille Restoration Act, Pub. L. No. 101-42, 103 Stat. 91 (1989); Mdewakanton and Wahpakoota Tribe of Sioux Indians, the Indian Education Assistance Act, Pub. L.

E. The Politics of Tribal Recognition

The BIA has been harshly criticized for allegedly allowing political considerations to enter into recognition determinations regarding tribal status, membership and leadership. Charges of influence peddling have been lodged against both the Clinton and Bush Administrations.²⁵³ Additionally, both the BIA and the Office of the Solicitor have been criticized for violating the due process rights of petitioners.²⁵⁴

Critics also contend that some Interior decisions affecting casinos are politically motivated.²⁵⁵ A Deputy Assistant Secretary was promptly fired after his former business partner reportedly asked at least three tribes for a high consulting fee and implied an ability to influence decisions pending before the BIA.²⁵⁶

The Federal Bureau of Investigation, Interior's Inspector General, and the General Accounting Office of Congress all launched an

No. 92-555, 86 Stat. 1168 (1972); Sisseton and Wahpeton Mississippi Sioux Tribe, 25 U.S.C. § 1300(d-3) (2000); Lower Skagit Tribe of Indians, 25 C.F.R. § 61.4(w) (2004); Kikiallus Tribe of Indians, *id.* § 61.4(x); Swinomish Tribe of Indians, *id.* § 61.4(y); and Samish Tribe of Indians, *id.* § 61.4(z). Separate regulations are provided for preparation of a roll of Independent Seminole Indians of Florida, *Id.* pt. 67; *see* Act of Apr. 30, 1990, Pub. L. No. 101-277, 104 Stat. 143; and revision of the membership roll of the Eastern Band of Cherokee Indians of North Carolina, 25 C.F.R. pt. 75 (2004); *see* Act of August 21, 1957, Pub. L. No. 85-154, 71 Stat. 374. Applicants for enrollment may appeal an adverse decision made by BIA officials. 25 C.F.R. pt. 62 (2004).

253. *See, e.g.,* Sean P. Murphy, *US: Documents on Indians Backdated; No Prosecution of Former Official*, BOSTON GLOBE, Mar. 1, 2002, at B2 (“[t]he Inspector General’s report portrays the BIA as being in a frenzy to conclude recognition of two tribes before the Bush administration took over on Jan. 20, 2001 . . .”). *See also* Michelle Malkin, *More Clintonian Deeds Go Unpunished*, JEWISH WORLD REVIEW, Mar. 6, 2002, available at <http://www.NewsAndOpinion.com>

(describing the backdating of tribal recognition forms after the end of the administration, Malkin charges “the Bureau of Indian Affairs . . . has become a career slot machine for government officials who parlay their public positions into lucrative lobbying jobs and consulting gigs.”)

254. A “particularly egregious” example involved a battle for recognition by the Samish Tribe, which began with the filing of their petition in 1972 and resulted in an administrative denial in 1987, a decision later vacated on due process grounds. *Greene v. Lujan*, 1992 WL 533059 (W.D. Wash. 1992), *aff’d*, 64 F.3d 1266 (9th Cir. 1995). On remand, an Administrative Law Judge (“ALJ”) made certain findings in support of recognition, which were then arbitrarily reversed by the Assistant Secretary after an *ex parte* meeting with an attorney for the BIA. Ruling on a supplemental complaint by the Tribe, the Court reinstated the ALJ’s findings, holding that the BIA had again violated the APA and the Fifth Amendment and finding the attorney, an Assistant Solicitor for the Department, in contempt of court. *Greene v. Babbitt*, 943 F. Supp. 1278 (W.D. Wash. 1996).

255. *See, e.g.,* William Safire, *The Interior Decorator*, N.Y. TIMES, Oct. 26, 1997, at sec. 4, p. 15; David E. Rosenbaum, *Interior Secretary Denies Politics had Role in Dispute Over Casino*, N.Y. TIMES, Oct. 31, 1997, at A1; Susan Schmidt, *Probe is Sought on Potential Corruption*, WASHINGTON POST, February 5, 2004, at A23; *Ashcroft urged to charge BIA officials*, Indianz.Com, March 1, 2002 (reporting that Virginia Congressman Frank Wolf Department had asked the Attorney General to bring criminal charges against former and current BIA officials in relation to their handling of federal recognition petitions), at <http://64.62.196.98/News/printme.asp?ID=law02/0312002-1>.

256. *See*, Wayne Barrett, *Inside Bush’s Indian Bureau*, VILLAGE VOICE, May 4, 2004, at 30; Wayne Barrett, *A Dirty Trickster’s Bush Bonanza*, VILLAGE VOICE, Apr. 27, 2004, at 26.

investigation into claims that the lure of gaming profits led BIA officials in California to manipulate tribal membership rolls in order to gain enrollment for themselves and their families and to override tribal resistance to establishment of a potentially lucrative casino.²⁵⁷ The Inspector General subsequently cleared the BIA of any wrongdoing in the matter.²⁵⁸

Critics similarly failed to prove wide-ranging charges of corruption at a May 5, 2004, hearing before the House Government Reform Committee. The DOI's inspector general testified that his investigations uncovered "harassment" of the staff that handles recognition, but by top officials at the BIA, not by lobbyists. He also contended that the recognition process is "one of the more transparent processes at Interior."²⁵⁹

More recently, the DOI Inspector General found no wrongdoing in the federal recognition of the Schaghticoke Indians of Connecticut. The investigation found that despite spending more than \$12 million on recognition efforts, the Tribe did not improperly influence BIA officials. The state's top elected officials, who oppose the tribe's recognition, responded angrily to the report. Connecticut Governor M. Jodi Rell termed the Schaghticoke decision "incomprehensible," Attorney General Richard Blumenthal said he was "disgusted and disappointed" with the report, and U.S. Rep. Rob Simmons called it "just a bunch of b.s."²⁶⁰

Critics say gambling interests, in particular, have too much influence over the recognition process, with some claiming that two-thirds of groups seeking federal recognition as Indian tribes are being bankrolled by casino investors.²⁶¹ The National Indian Gaming Association ("NIGA"), an organization of gaming tribes, has endeavored to dispel the notion that tribal recognition decisions are linked to gaming interests. NIGA notes that of fifteen Tribes that have received federal recognition since 1988, only one has gaming.²⁶²

Yet there is no question but that recognition efforts have attracted

257. See, e.g., Don Thompson, *Congress Begin Probe of Alleged BIA Conflict*, NATIVE AMERICAN TIMES, Mar. 3, 2004, at 11.

258. See, e.g., *BIA Official is Cleared in Influence Probe*, July 2, 2004, at A13. As of this writing, the FBI probe continues. See Jim Reece, *FBI Tribal Probe Continues*, AMADOR LEDGER DISPATCH, Aug. 04, 2004, available at <http://www.wrh.noaa.gov/sacramento/>.

259. See, e.g., Frederic J. Frommer, *BIA Reorganization Plan Called 'Insulting' to Tribes*, SAN DIEGO UNION-TRIBUNE, May 12, 2004 at F-5; *Critics Take BIA to Task Over Federal Recognition*, May 6, 2004, at <http://www.indianz.com/News/2004/001644.asp>.

260. Rick Green, *Probe Upholds Ruling on Tribal Recognition*, HARTFORD COURANT, Sept. 1, 2004, at B-1; *Inspector General investigation called 'bunch of b.s.'*, Sept. 1, 2004 at <http://www.indianz.com/News/2004/004028.asp>.

261. See Iver Peterson, *Would-Be Tribes Entice Investors*, N.Y. TIMES, Mar. 29, 2004, at A1.

262. <http://www.indiangaming.org/library/index.html#facts>.

powerful financial backing. Over the past decade, for example, Donald Trump invested more than \$10 million in a group seeking recognition as the Paucatuck Eastern Pequots in Connecticut. However, in June 2002, the BIA granted recognition to another group claiming to represent the tribe, which then “fired” Trump in favor of its own financial backers. Trump is asking a court to order the Tribe to return his money.²⁶³

V. LAW AND ORDER IN INDIAN COUNTRY

A. Tribal Jurisdiction

The United States has consistently recognized Indian tribes as “distinct, independent political communities,”²⁶⁴ with inherent powers of self-government.²⁶⁵ The Supreme Court long ago upheld “the right of reservation Indians to make their own laws and be ruled by them.”²⁶⁶ The Court has recognized the authority of tribal governments to provide for the protection of health and safety of reservation residents and the political integrity of the tribe.²⁶⁷

Tribal courts have repeatedly been recognized as “appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.”²⁶⁸ The Supreme Court has acknowledged the breadth of tribal court jurisdiction, stating: “If state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law.”²⁶⁹ The Court has ruled that a question of a tribal court’s jurisdiction over a reservation-based suit against a non-Indian must be determined in the first instance not in federal court but in tribal court.²⁷⁰ The Court has also observed that “[n]onjudicial tribal institutions have also been

263. See Rick Green, *Casino Investors’ ‘Survivor’*, HARTFORD COURANT, Aug. 24, 2004, at B-1; Karen Florin, “*Sorting Out Trump Suit Isn’t Easy*,” THE NEW LONDON DAY, Aug. 24, 2004, at <http://www.theday.com/eng/web/store/itm.aspx?re=71a5328e-9a6c-4991-9262-4a3aa991f139&itm=art>; *Hearing held in suit over recognition backers*, Aug. 25, 2004, at <http://www.indianz.com/News/2004/003926.asp>.

264. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832).

265. *United States v. Wheeler*, 435 U.S. 313, 323-24 (1978).

266. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

267. *Montana v. United States*, 450 U.S. 544, 566 (1981).

268. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978).

269. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987).

270. *Nat’l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856 (1985). The United States Court of Appeals for the Ninth Circuit found it proper to require even the Federal government to resort to tribal court to enforce a Federal statute concerning trespass on tribal lands. *United States v. Plainbull*, 957 F.2d 724 (9th Cir. 1992).

recognized as competent law-applying bodies.”²⁷¹

Although tribes retain considerable authority over the conduct of both tribal members and nonmembers on Indian land, or land held in trust for a tribe by the United States,²⁷² Congress and the Court have imposed a number of restrictions on tribal jurisdiction, sometimes by expanding state and federal jurisdiction into Indian country.²⁷³ A series of Congressional enactments in the 19th century extended federal criminal jurisdiction into Indian country, without eliminating concurrent tribal jurisdiction, beginning with the Indian Country Crimes Act²⁷⁴ and culminating in the Major Crimes Act.²⁷⁵

Congress extended state jurisdiction into Indian country in 1953 with the passage of Public Law 280,²⁷⁶ which gave several states extensive criminal and civil jurisdiction over Indian Country and allowed others to acquire such jurisdiction at their option. Although Public Law 280 was initially intended to extend state criminal jurisdiction to certain California reservations, by the time the bill was passed, it had been transformed into a general measure conferring criminal and civil jurisdiction on several states.²⁷⁷

Public Law 280 eliminates federal criminal jurisdiction for certain crimes committed in Indian Country,²⁷⁸ however, the federal government retains authority to enforce federal criminal laws of general application in Indian Country. Public Law 280 also granted states concurrent civil jurisdiction with regard to most matters in Indian country.²⁷⁹ This grant

271. *Santa Clara Pueblo*, 436 U.S. at 66.

272. *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997).

273. “Indian country” is the term commonly applied to territory under the jurisdiction of a tribe, although the statutory definition is both more expansive and more precise.

[T]he 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.

18 U.S.C. § 1151 (2004). Adopted for purposes of the criminal code, the definition applies as well in determining questions of civil jurisdiction. *Alaska v. Native Village of Venetie*, 522 U.S. 520, 527 (1998).

274. 3 Stat. 383 (1817) (codified at 18 U.S.C. § 1152 (2000)) (crimes by non-Indians against Indians and non-major crimes by Indians against non-Indians).

275. 23 Stat. 362, 385 (1885) (codified at 18 U.S.C. § 1153 (2000)) (major crimes committed by Indians).

276. 67 Stat. 588 (codified at 18 U.S.C. § 1162(a) (2000)).

277. C. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535, 540-41 (1975).

278. Indian Crimes Act of 1976, 18 U.S.C. § 1151 (2000); Major Crimes Act, 18 U.S.C. § 1153 (2004).

279. 28 U.S.C. § 1360(a) (2004).

did not include the application of local law,²⁸⁰ nor does it include the power to regulate land use.²⁸¹

The most important affirmative limitation imposed by Congress on tribal criminal jurisdiction is the Indian Civil Rights Act of 1968 (“ICRA”),²⁸² which applies most of the provisions of the Bill of Rights to tribal governments and limits the maximum sentence that may be imposed by a tribal court to one year in prison and a \$5,000 fine.²⁸³ The ICRA also amended Public Law 280 by making further state assumption of jurisdiction contingent upon tribal consent.²⁸⁴

The Supreme Court has held that the Indian Civil Rights Act did not give jurisdiction to Federal courts to review tribal compliance with the Act, except in the case of a petition for a writ of habeas corpus.²⁸⁵ The Court stated “[t]ribal forums are available to vindicate rights created by the ICRA”²⁸⁶ The Court also suggested an additional alternative to federal habeas corpus and tribal enforcement of the ICRA where tribal constitutions required that the Secretary of the Interior approve new ordinances so that the Department of the Interior might enforce the ICRA.²⁸⁷

The Second Circuit Court of Appeals has rendered some of the more expansive opinions regarding the existence of federal court habeas jurisdiction under the ICRA. In one such case, the court found “banishment” from the reservation to be the equivalent of a restraint on liberty sufficient to invoke the habeas relief available under the ICRA.²⁸⁸ In a subsequent case, however, the court declined to find the legal equivalent of banishment in the seizure and destruction of tribal members’ homes, allegedly with the specific intent to punish them for exercising various protected rights.²⁸⁹ Other courts have recognized that when a tribal official acts beyond his lawful authority, the official may

280. *See, e.g.*, *Santa Rosa Band of Mission Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977); *Segundo v. City of Rancho Mirage*, 813 F.2d 1387, 1390 (9th Cir. 1987).

281. 18 U.S.C. § 1162(b) (2004); 28 U.S.C. § 1360(b) (2004).

282. 25 U.S.C. § 1301 (2004).

283. *Id.* § 1302(7) (2000).

284. *Id.* §§ 1311-1312, 1321-1326.

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

286. *Id.* at 65. For an analysis of tribal court implementation of the ICRA, *see* Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465 (1998).

287. *Santa Clara Pueblo*, 436 U.S. at 66 n.22.

288. *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 895 (2d Cir. 1996).

289. *Shenandoah v. Halbritter*, 366 F.3d 89 (2d Cir. 2004). Noting “the presence of twenty or thirty Indian women engaged in prayer in the courtroom and adjoining hallway when this appeal was argued,” the court nevertheless suggested “Congress should consider giving this Court power to act.” *Id.* at 92-93.

be sued.²⁹⁰

The IBIA has held that in cases where the BIA has authority to review a tribal action, it has the authority and the responsibility to review the tribal action for violations of the ICRA.²⁹¹ However, the IBIA has also held that ICRA is not an independent grant of authority and does not authorize BIA to scrutinize tribal actions not otherwise properly within its jurisdiction.²⁹²

The Supreme Court has also recognized far-reaching limitations on tribal jurisdiction.²⁹³ Beginning in the late 1970s, the Court has increasingly found inherent limitations on tribal sovereignty, including the lack of criminal jurisdiction over non-Indians,²⁹⁴ freedom from state taxation of on-reservation sales to non-Indians,²⁹⁵ ability to prohibit hunting and fishing by non-Indians on reservation fee lands,²⁹⁶ and to zone reservation fee lands.²⁹⁷ The Court has inferred congressional intent to diminish a reservation,²⁹⁸ to permit state taxation of Indian-owned reservation allotments held in fee,²⁹⁹ to authorize state taxation of commerce with Indian tribes,³⁰⁰ and to restrict the ability of tribes to tax the activities of nonmembers on fee simple land within reservation boundaries,³⁰¹ or to try non-member Indians.³⁰²

More recently, the Court has found tribal courts lack jurisdiction to

290. *See, e.g.,* *Dawavendewa v. Salt River Project*, 276 F.3d 1150, 1159-61 (9th Cir. 2002), *cert. denied*, 537 U.S. 820 (2002).

291. *E.g.,* *Torres v. Acting Muskogee Area Dir.*, 34 IBIA 173 (1999); *Naylor v. Sacramento Area Dir.*, 23 IBIA 76 n.3 (1992); *Greendeer v. Minneapolis Area Dir.*, 22 IBIA 91 (1992).

292. *E.g.,* *Welmas v. Sacramento Area Dir.*, 24 IBIA 264, 272 (1993).

293. *See* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1576 (1996); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001).

294. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978). Many commentators have called for a statutory fix to *Oliphant*. One of the more persuasive notes that Native Americans are victimized at alarming rates by non-Indian criminal perpetrators, thus *Oliphant* has adversely affected public safety in Indian country by preventing tribes from protecting their members from these acts. *See* Christopher B. Chaney, *The Effect of the United States Supreme Court's Decisions During the Last Quarter of the Nineteenth Century on Tribal Criminal Jurisdiction*, 14 BYU J. PUB. L. 173 (2000).

295. *Washington v. Confederated Tribes*, 447 U.S. 134, 155 (1980).

296. *Montana v. United States*, 450 U.S. 544, 566 (1981).

297. *Brendale v. Confederated Tribes and Bands*, 492 U.S. 408, 428 (1989).

298. *Hagen v. Utah*, 510 U.S. 399, 420 (1994).

299. *County of Yakima v. Confederated Tribes and Bands*, 502 U.S. 251, 270 (1992); *see also, Cass County, Minnesota v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998) (state permitted to tax formerly allotted lands reacquired in fee simple by tribe).

300. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995).

301. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 651-53 (2001).

302. *Duro v. Reina*, 495 U.S. 676 (1990). After Congress essentially overturned that ruling, *see* 25 U.S.C. § 1301(2) (2000), the Court upheld the right of Congress to recognize such "inherent" tribal jurisdiction. *See also* *United States v. Lara*, 124 S. Ct. 1628 (2004).

hear a case involving a highway accident on a right-of-way through tribal trust lands³⁰³ or to hear a civil claim against state officers who enter tribal land to execute a search warrant against a tribal member suspected of having violated state law outside the reservation.³⁰⁴ The Court has also found that Alaska tribes lack jurisdiction over Indian lands.³⁰⁵ Additionally, the Court has ruled that states retain jurisdiction to enter reservations to investigate and prosecute off-reservation violations.³⁰⁶

Congress, acting to curb what it deemed to be abusive practices by state courts, gave tribal courts presumptive jurisdiction over many child custody matters in the Indian Child Welfare Act of 1978.³⁰⁷ The Indian Child Welfare Act provides that Indian tribes may reassume jurisdiction over child custody proceedings on those reservations over which states obtained jurisdiction pursuant to Public Law 280.³⁰⁸ BIA regulations set out procedures for tribes to petition to reassume jurisdiction over child custody proceedings.³⁰⁹

Although the U.S. Constitution requires states to give full faith and credit to the judgments of the courts of other states, it does not mention tribes.³¹⁰ Nevertheless, some states extend full faith and credit to judgments of tribal courts,³¹¹ whereas other state and federal courts have recognized tribal judgments as a matter of comity.³¹²

B. Courts of Indian Offenses

The BIA is normally precluded from imposing federal standards on tribal court administration and conduct.³¹³ Each Tribe controls its own judicial system, although intertribal court systems are not uncommon.³¹⁴

303. *Strate v. A-1 Contractors*, 520 U.S. 438, 440-43 (1997).

304. *Nevada v. Hicks*, 533 U.S. 353 (2001).

305. *Alaska v. Native Village of Venetie Tribal Gov't*, 118 S. Ct. 948, 955 (1998).

306. *Hicks*, 533 U.S. 353.

307. Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 (2000).

308. 25 U.S.C. § 1952 (2000). The Act of August 15, 1953, 67 Stat. 588, Pub.L. No. 83-280, gave several states extensive criminal and civil jurisdiction over Indian Country and allowed other states to acquire it at their option.

309. 25 C.F.R. § 13.11 (2004).

310. U.S. CONST. Art. IV, Sec. 1.

311. *E.g., In re Buehl*, 87 Wash. 2d 64955 P.2d 1334 (1976).

312. *See, e.g., Wipert v. Blackfeet Tribe*, 201 Mont. 299, 654 P.2d 512 (1982); *AT&T Corp. v. Coeur d'Alene Tribe* 295 F.3d 899, 903 (9th cir. 2002).

313. 25 U.S.C. § 3611(d), (e)(1)(E) (2000).

314. The National American Indian Court Judges Association (“NAICJA”), established in 1969, is a national voluntary association of tribal court judges. The Association is primarily devoted to the support of American Indian and Alaska Native justice systems through education, information sharing and advocacy. *See* <http://www.naicja.org>. The National Tribal Justice Resource Center, a project of the NAICJA, is dedicated to tribal justice systems, personnel and tribal law. The Resource Center is the central national clearinghouse of information for Native American and Alaska Native

However, where tribes have not established tribal courts, the BIA has established “Courts of Indian Offenses” on certain Indian reservations under the authority vested in the Secretary of the Interior by the Snyder Act, which authorizes appropriations for “Indian judges,” and pursuant to more generalized authority.³¹⁵

These BIA funded courts operate pursuant to regulations of 25 C.F.R. Part 11 and are commonly called “C.F.R. Courts” (for the Code of Federal Regulations). C.F.R. Courts are considered both agencies of the Federal government and tribal courts.³¹⁶ Due to the unique history of the tribes located in the former “Indian Territory,” many of the C.F.R. Courts are located within the boundaries of present day Oklahoma.³¹⁷

C.F.R. Courts enforce federal regulations concerning criminal³¹⁸ and civil causes of action,³¹⁹ domestic relations,³²⁰ probate,³²¹ children,³²² juvenile offenders,³²³ and minors in need of care³²⁴ as well as any tribal ordinances that have been approved by the Department.³²⁵ Criminal jurisdiction is limited to tribal members³²⁶ and civil jurisdiction is limited to suits wherein the defendant is Indian unless the parties stipulate to the court’s jurisdiction.³²⁷ The statute of limitations for criminal actions is five years³²⁸ and three years for civil actions.³²⁹ Unless authorized by the tribal government, no C.F.R. Court may exercise jurisdiction over tribal election disputes, internal tribal government disputes, or suits against the tribe.³³⁰ A decision of the BIA on who is a tribal official is binding on a C.F.R. Court.³³¹

Each C.F.R. Court has a trial and appellate division.³³² Appeals are

tribal courts, providing both technical assistance and resources for the development and enhancement of tribal justice system personnel. *See* <http://www.ntjrc.org>.

315. 25 U.S.C. § 13 (2000); *see also* 5 U.S.C. § 301 (2000); 25 U.S.C. §§ 2, 9 (2000).

316. *See* *Tillet v. Hodel*, 730 F. Supp. 381 (W.D. Okla. 1990), *aff’d* 931 F.2d 636 (10th Cir. 1991).

317. 25 C.F.R. § 11.100 (2004).

318. § 11.100(d).

319. § 11.100(e).

320. § 11.100(f).

321. § 11.100(g).

322. § 11.100(i).

323. § 11.100(j).

324. § 11.100(k).

325. § 11.101.

326. § 11.102(a).

327. § 11.103(a).

328. § 11.102(b).

329. § 11.103(b).

330. § 11.104(b).

331. § 11.104(c).

332. § 11.200.

heard by a panel of three magistrates and are not subject to further appeal within the Department.³³³ Magistrates are appointed by the Department and confirmed by the tribe and they serve four-year terms but may be removed by the Department for cause.³³⁴ Court records are considered to be records of the Department and are subject to the Privacy Act and the Freedom of Information Act.³³⁵ The Department also appoints a prosecutor for each court.³³⁶ Practice is permitted by attorneys and lay counsel.³³⁷

Criminal laws³³⁸ and procedures³³⁹ are detailed in the regulations. Criminal defendants are entitled to counsel at their own expense.³⁴⁰ Sentences may not exceed six months imprisonment and a \$500 fine.³⁴¹ The civil law to be applied includes federal statutes or regulations, tribal ordinances or customs, or in the absence of the foregoing, the law of the State in which the dispute arises.³⁴² There are detailed federal regulations concerning domestic relations,³⁴³ probate of non-trust assets,³⁴⁴ appellate proceedings,³⁴⁵ children's court,³⁴⁶ juvenile offenders,³⁴⁷ and minors in need of care.³⁴⁸ The IBIA has no jurisdiction to review decisions made by tribal officials, tribal governing bodies, or tribal courts including C.F.R. Courts.³⁴⁹

The BIA operates twenty-two Courts of Indian Offenses. Tribes operate others under contract/compact agreements with performance monitoring subject to negotiation with each tribe.³⁵⁰ Within the BIA's

333. § 11.200(h).

334. § 11.200(b).

335. § 11.206.

336. § 11.204.

337. § 11.205.

338. § 11.205(d).

339. § 11.205(c).

340. The Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 (2000), which essentially extended most of the Bill of Rights to tribal governments, did not include the right to have counsel appointed for an indigent defendant. *Id.* § 1302(6).

341. The Indian Civil Rights Act of 1968 was amended to permit sentences up to one year and \$5,000 fine, but the C.F.R. Court regulations do not reflect this change. 25 U.S.C. § 1302(7) (2004); 25 C.F.R. § 11.315(a) (2004).

342. 25 C.F.R. § 11.500 (2004).

343. § 11.600-611.

344. § 11.700-713.

345. § 11.800-806.

346. § 11.900-912.

347. § 11.1000-1014.

348. § 11.1100-1115.

349. *See, e.g.,* Pounds v. Court of Indian Offenses, Miami, Oklahoma, 31 IBIA 308, *recon. denied*, 32 IBIA 60, 32 IBIA 89 (1998). In any event, the IBIA generally defers to tribal forums in resolving intra-tribal disputes, citing cases such as *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) and *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985).

350. Program Assessment Rating Tool (PART), at 336, White House OMB (2004)

Tribal Priority Allocation (“TPA”) program, tribal governments determine annual allocations among thirty-five programs including tribal court operations. In fiscal year (“FY”) 2003, TPA funds total \$772 million, of which \$26 million is available for tribal courts.³⁵¹ The White House Office of Management & Budget (“OMB”) has criticized the BIA because the tribal courts program lacks long-term goals and annual performance measures and because tribal courts are not required to report on staffing, caseloads, time for adjudication, appeals to non-tribal courts, case dispositions, or other performance indicators. According to the OMB, the BIA has conducted no credible independent evaluations and none are planned.³⁵²

The BIA has no current inventory of tribal courts, but estimates about 275 general, special (i.e. traffic, juvenile, family) and appellate courts serve about 40 tribes. Most tribes have adopted modern and customary codes that are usually based on federal and state statutes. It is estimated that about 42% of tribal court cases concern criminal matters with potential jail time.³⁵³

C. Law Enforcement

The BIA is responsible for overall policy development and implementation of the Indian Law Enforcement Reform Act,³⁵⁴ for its own law enforcement programs and for law enforcement activities contracted to tribes.³⁵⁵ The Office of Law Enforcement Services (“OLES”) is a semi-autonomous agency within the BIA that carries out these responsibilities.³⁵⁶ In addition to its own officers commissioned to enforce applicable federal criminal statutes, the OLES may issue law enforcement commissions to other federal, state, tribal and local law enforcement officers.³⁵⁷ With the permission of the tribe, OLES officers may enforce tribal law as well.³⁵⁸

It is common for the BIA and tribes to have difficulty getting local or State law enforcement to respond to crimes on the reservations. For example, it is difficult to get local law enforcement to respond to

[hereinafter OMB PART]; see <http://www.whitehouse.gov/omb/budget/fy2005/pma/interior/pdf>.

351. OMB PART, *supra* note 350, at 337.

352. OMB PART, *supra* note 350, at 336-41.

353. OMB PART, *supra* note 350, at 336. Other caseloads included traffic (26%), juvenile (15%), family (7%), housing/land use (3%), and commercial (3%). *Id.*

354. Indian Law Enforcement Reform Act, 25 U.S.C. §§ 2801-2909 (2000).

355. 25 C.F.R. § 12.1 (2004).

356. § 12.2.

357. § 12.21.

358. § 12.22.

domestic violence calls and illegal disposal activities in Indian country.³⁵⁹ Often, tribal law enforcement officers are limited to restraining these perpetrators until a county, State, or Federal officer arrives. In response to these complex jurisdictional hurdles, BIA has adopted a policy of entering into agreements whereby it grants special law enforcement commissions to tribal and local law enforcement officers.³⁶⁰

The BIA placed a moratorium on the issuance of deputation agreements in response to a federal court ruling that prohibited such deputized tribal officers from driving police vehicles equipped with emergency light bars on California highways that connect the various parts of the tribe's reservation.³⁶¹ Another tribe successfully challenged the moratorium and established its right to contract for the programs under the Indian Self-Determination and Education Assistance Act,³⁶² and thereby seek to qualify for the special law enforcement commission.³⁶³

In 2000, the BIA and tribal agencies employed about 2,300 full time law officers and 1,160 support personnel. Other federal agencies employed over 88,000 officers and 72,000 support personnel. The Federal Bureau of Investigation ("FBI") conducts felony (criminal) investigations on Indian reservations. State/local agencies employed over 708,000 officers and 311,000 support personnel. In FY 2002, the BIA supported 206 Indian police agencies. Tribes managed 163 (79%) of local agencies under Indian self-determination contract or compact agreements. The BIA managed 43 (21%) agencies.³⁶⁴ In 2002, DOI's Inspector General conducted a department-wide review of law enforcement programs, and cited the BIA as a model for personnel and training standards, operations manuals, staffing redeployment, records systems, and incident reporting.³⁶⁵

The OLES has recommended that over the next three years an additional 1,500 Native American officers be hired to complement the approximately 2,700 who presently patrol the reservations. Instead, it

359. See, e.g., Nelsy Rodriguez, *Tribe on Offensive Against Offal*, THE DESERT SUN, July 16, 2004, at A1.

360. Internal Law Enforcement Services Policies, 69 FR 6321 (Feb. 10, 2004). This notice publishes internal policies on Cross-Deputation Agreements, Memoranda of Understanding, Memoranda of Agreement, and Special Law Enforcement Commission Deputation Agreements. These policies apply to all Cross-Deputation Agreements, Memoranda of Understanding, Memoranda of Agreement, and Special Law Enforcement Commission Deputation Agreements.

361. *Cabazon Band of Mission Indians v. Smith*, 2002 WL 32065673 (C.D. Cal. 2002).

362. Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. § 450 et seq).

363. *Hopland Band of Pomo Indians v. Norton*, 324 F. Supp. 2d 1067 (N.D. Cal. 2004).

364. OMB PART, *supra* note 350, at 95.

365. OMB PART, *supra* note 350, at 97.

appears that 759 police positions on reservations will lose their federal funding by 2006.³⁶⁶ Interestingly, especially in light of these conditions, Indian tribal police departments have been outspoken in their support of the concept of civilian oversight, unlike their counterparts in police departments throughout the United States.³⁶⁷

BIA regulations set standards for Indian Country detention facilities and programs whether operated by the BIA or by tribes that receive federal funds. The regulations are promulgated to ensure compliance with the Indian Country Law Enforcement Reform Act of 1990³⁶⁸ and the Indian Alcohol and Substance Abuse Prevention Act.³⁶⁹ Unfortunately, the nation's reservation jails have repeatedly been found to violate the most basic health and safety standards, posing serious risks to over 2,000 inmates as well as their guards.³⁷⁰

The 74 detention centers on reservations hold 1,699 adults and 307 juveniles, according to most recent federal figures from 2002. The BIA operates 20 of the prisons and provides funding for 46 others, whereas eight facilities are run by tribes. A recent investigation by DOI's Inspector General catalogued hundreds of suicide attempts and escapes at the 27 prisons they visited, and several unreported deaths. The report states that the BIA's jails are a "national disgrace with many facilities having conditions comparable to those found in third-world countries," adding that "BIA appears to have a 'laissez-faire' attitude in regard to these horrific conditions at its detention facilities." OLES officials admitted that none of their detention facilities "come close" to meeting the BIA's standards for operation, which derive from nationally recognized detention standards.³⁷¹

366. See Matt Ross, *BIA/Tribal Budget Advisory Council Meeting*, INDIAN COUNTRY TODAY, Mar. 16, 2004, at <http://www.indiancountry.com/content.cfm?id=1079449349&CFID=71543&CFTOKEN=49167035>.

367. Eileen M. Luna, *Seeking Justice: Critical Perspectives Of Native People: Law Enforcement Oversight in the American Indian Community*, 4 GEO. PUB. POLICY REV. 149 (Spring 1999).

368. Pub. L. No. 101-379, 104 Stat. 473 (codified at 25 U.S.C. §§ 2801-2809 (2000)).

369. Pub. L. No. 99-570, 100 Stat. 3207-148 (codified at 25 U.S.C. § 2414(a) (2000)).

370. See, e.g., Kevin Johnson, *Federal Investigators Probe Tribal Prison Deaths*, USA TODAY, May 21, 2004, at 1A; Kevin Johnson, *Death of Girl Part of Indian Prisons Inquiry*, USA TODAY, May 24, 2004, at 3A; see also Michael Jamison, *Little has Changed in Decaying Indian Jails*, MISSOULIAN, Apr. 19, 2004, at <http://www.missoulian.com/articles/2004/04/19/news/mtregion-al/znews01.txt>; *Upgrading Reservation Jails Should be Priority*, Great Falls Tribune (opinion), May 27, 2004, at 6A ("In the shadow of abuses at the infamous Abu Ghraib prison in Iraq, it's disheartening to see a national report on abysmal conditions at jails and prisons in Indian Country, including in Montana.")

371. Indian Tribal Detention Facilities, Hearing Before the Senate Committee on Indian Affairs, June 23, 2004. (Testimony of the Honorable Earl E. Devaney, Inspector General for the Department of the Interior), available at <http://indian.senate.gov/2004hearings/062304hrg/>; Indian Country Detention Facilities, Assessment No. X-EV-BIA-0114-2003, Apr. 2004, available at

In response to concerns raised by the Senate Committee on Indian Affairs, David W. Anderson, Assistant Secretary–Indian Affairs, testified that the BIA is already working on corrective actions, including: closing unsafe facilities; revising the procedures for reporting and reviewing serious incidents; inspecting Indian Country detention centers for compliance with national law enforcement, facility, safety and environmental standards; initiating capital improvements to correct imminently hazardous or mission critical deficiencies; identifying funds to address immediate shortfalls in law enforcement staffing and operations for BIA-funded facilities; and standardizing detention facility inspections. Anderson also testified that the BIA will spend \$6.4 million on prison operations in 2004, up from \$1.4 million in the previous year.³⁷²

The Indian Tribal Justice Act established an Office of Tribal Justice Support within the BIA to further the development, operation and enhancement of tribal justice systems and Courts of Indian Offenses.³⁷³ The Indian Tribal Justice Technical and Legal Assistance Act of 2000 authorizes DOJ to award grants to (1) Indian tribes for development/operation of judicial systems, (2) national/regional organizations to provide training/technical assistance to tribes, and (3) non-profit entities to provide criminal/civil legal assistance to tribes and tribal members.³⁷⁴

In 1999, DOJ began awarding Community Oriented Policing Services (“COPS”) grants directly to tribal governments to support new police officer, criminal investigator, dispatcher, detention officer, and other positions. The COPS grants may cover 75% of additional salary, training, and equipment expenses for 3 years and are renewable for two years.³⁷⁵ The OMB has noted that the BIA and the DOJ have no formal coordination on tribal COPS grant applications, awards, and compliance oversight. During FYs 1999-2002, a total of 48 BIA and tribal police operations received three annual COPS grants. Up to 125 COPS funded positions will expire by FY 2005, but BIA has no plans to assume these positions in its budget.³⁷⁶

Since the BIA-DOJ Indian law enforcement initiatives, BIA funding

<http://www.oig.doi.gov>; Christopher Lee, *Indian Jails Need to Improve, Officials Say*, WASHINGTON POST, June 24, 2004, A23.

372. Indian Tribal Detention Facilities, Hearing before the Senate Committee on Indian Affairs, June 23, 2004. (Statement of David W. Anderson, Assistant Secretary–Indian Affairs).

373. Pub. L. No. 103-176, 107 Stat. 2004 (codified at 25 U.S.C. §§ 3601-3631 (2000)).

374. Pub. L. No. 106-559, 114 Stat. 2778 (codified at 25 U.S.C. §§ 3651-3681 (2000)).

375. OMB PART, *supra* note 350, at 95.

376. OMB PART, *supra* note 350, at 95, 98; *see also* Dan Eggen, *Hiring under COPS Appears Set to End*, WASHINGTON POST, Sept. 29, 2004 at A25.

has increased from \$96.3 million in FY 1999 to \$159 million in FY 2003. The BIA's FY 2004 Budget requested \$169 million for police and detention facility operations. The DOJ funding has increased from \$182 million in FY 1999 to \$209 million in FY 2003. The DOJ's FY 2004 Budget requests \$214.9 million, including \$30 million for COPS and \$35 million for new detention facilities.³⁷⁷ Twenty new detention centers funded by DOJ grants have been constructed and staffed by the BIA.³⁷⁸

D. Unequal Justice

In spite of the combined efforts of the BIA and the DOJ, findings by the U.S. Commission on Civil Rights indicate that:

[A]ll three components of law enforcement—policing, justice, and corrections—are substandard in Indian Country as compared with the rest of the nation. Native Americans are twice as likely as any other racial/ethnic group to be the victims of crime. Yet per capita spending on law enforcement in Native American communities is roughly 60% of the national average. Correctional facilities in Indian Country are more overcrowded than even the most crowded state and federal prisons.³⁷⁹

Native American women are 50% more likely to be victimized than the next highest group (African American men). Indian Country crimes are twice as likely to be violent than are those committed elsewhere. Native Americans in rural areas are more than twice as likely to be victims of crime than are rural whites, even though most violent crimes against Native Americans occur in urban areas. Native Americans are more likely than other groups "to experience violence at the hands of someone of a different race."³⁸⁰

Although there are disproportionately few law enforcement officers in Indian Country, Native Americans are incarcerated at a rate 38% higher than the national per capita rate. Federal prisons hold 50 percent more Native American youth than they did in 1994.³⁸¹

Several observers have remarked on the inequities suffered by both Native American victims and offenders through the application of federal laws in Indian country. Under the Federal Sentencing Guidelines, Indians

377. OMB PART, *supra* note 350, at 95, 98.

378. Indian Tribal Detention Facilities, *supra* note 371.

379. A QUIET CRISIS, *supra* note 46, at xi.

380. A QUIET CRISIS, *supra* note 46, at 67-68.

381. A QUIET CRISIS, *supra* note 46, at 69.

may be likely to receive longer sentences imposed by federal courts as compared to non-Indian offenders who would be sentenced under generally more lenient state laws.³⁸² On the other hand, the Federal Guidelines do not currently recognize the sentences of tribal courts in weighing the past criminal conduct of a defendant in the federal sentencing regime.³⁸³ One advocate has proposed changes in the law to allow civil suits for prospective injunctive relief against Indian law enforcement officials who fail to enforce protective orders from other states or tribes.³⁸⁴

VI. INDIAN LAND AND WATER

The BIA is responsible for the administration and management of 55.7 million acres of land held in trust by the United States for American Indians, Indian tribes, and Alaska Natives.³⁸⁵ Developing forestlands, leasing assets on these lands, directing agricultural programs, protecting water and land rights, developing and maintaining infrastructure and economic development are all part of the agency's responsibility.³⁸⁶ Records of Indian land holdings are not normally recorded, as are fee holdings, with county officials. Rather, the BIA Land Title and Records Offices record and maintain custody of records that affect title to Indian lands and examine title and provide title status reports.³⁸⁷

A. Acquisition of Indian Lands

One of the most controversial aspects of federal policy with respect to Indian lands is that of acquiring lands for tribes. The primary authority for taking land into trust for Indians or tribes is the following provision of the IRA:

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any

382. See, e.g., Gregory D. Smith, *Comment: Disparate Impact of the Federal Sentencing Guidelines on Indians in Indian Country: Why Congress Should Run the Erie Railroad into the Major Crimes Act*, 27 *HAMLIN L. REV.* 484 (Summer, 2004).

383. Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 *ARIZ. ST. L.J.* 403 (Spring 2004).

384. Sandra J. Schmieder, *The Failure of the Violence Against Women Act's Full Faith and Credit Provision in Indian Country: An Argument for Amendment*, 74 *U. COLO. L. REV.* 765 (2003). But see Sumayyah Waheed, *Comment, Domestic Violence on the Reservation: Imperfect Laws, Imperfect Solution*, 19 *BERKELEY WOMEN'S L.J.* 287 (2004).

385. <http://www.doi.gov/bureaus.html>.

386. *Id.*

387. 25 C.F.R. pt. 150 (2000).

interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.³⁸⁸

In addition to this general land acquisition authority, Congress has adopted numerous statutes mandating acquisition of land in trust for particular tribes.³⁸⁹ The Secretary of the Interior may proclaim that lands acquired in trust for a tribe become part of that tribe's reservation.³⁹⁰ Federal law also permits the use of funds derived from the sale or condemnation of Indian trust or restricted lands for the purchase of replacement land to be held in trust.³⁹¹

Several federal statutes provide for the acquisition of surplus or donated property. The DOI may accept donations of property for the advancement of Indians.³⁹² The General Service Administration ("GSA") may transfer excess federal land within an Indian reservation to the DOI to be held in trust for that tribe.³⁹³ Tribes may acquire surplus federal property from federal agencies, specifically including the BIA, IHS and GSA, for the performance of a contract function under the ISDEAA.³⁹⁴ Tribes may also acquire excess military property under the Base Realignment and Closure Act ("BRAC").³⁹⁵

Federal courts have frequently been asked to find that 25 U.S.C. § 465 is an unconstitutional delegation of legislative authority. The Eighth Circuit Court of Appeals accepted that argument but the decision was vacated by the United States Supreme Court.³⁹⁶ On remand from the Circuit, the district court upheld the constitutionality of Section 465.³⁹⁷

388. 25 U.S.C. § 465 (2000). The Indian Land Consolidation Act, 25 U.S.C. § 2202 (2000), extends this authority to tribes that did not adopt the IRA.

389. *E.g.*, Coquille Restoration Act, 25 U.S.C. § 715-715(g) (2004); Menominee Restoration Act, 25 U.S.C. § 903d(c) (2004); Ponca Restoration Act, 25 U.S.C. § 983b(c) (2004).

390. Act of June 18, 1934, 25 U.S.C. § 467 (2004).

391. *Id.* § 409(a).

392. *Id.* § 451.

393. 40 U.S.C. § 483(a)(1) (2000).

394. 25 U.S.C. § 450j(f) (2004).

395. Pub. L. No. 100-526, 102 Stat. 2628, 10 U.S.C. § 2687 (2000). It has been suggested that BIA should streamline its procedures for accepting such property into trust for tribes, which are claimed to be redundant. *See* Geoffrey D. Strommer and Craig A. Jacobson, *Indian Tribes and the Base Realignment and Closure Act: Recommendations for Future Trust Land Acquisitions*, 75 N.D. L. REV. 509 (1999). The BIA is unlikely to do so due to heightened concerns about the environmental liabilities often associated with surplus military bases.

396. *South Dakota v. United States Dept. of Interior*, 69 F.3d 878 (8th Cir. 1995), *cert. granted and judgment vacated*, *Dept. of Interior v. South Dakota*, 519 U.S. 919 (1996), *mandate recalled, opinion vacated*, 106 F.3d 247 (1996).

397. *South Dakota v. United States*, 314 F. Supp. 2d 935 (D.S.D. 2004).

Other courts have reached the same conclusion.³⁹⁸

The argument has been soundly rejected by the Tenth Circuit Court of Appeals,³⁹⁹ which determined that “Congress properly delegated to the Secretary of the Interior authority to make (trust) acquisitions, and the Secretary then granted a delegation of general authority to the Commissioner of Indian Affairs.”⁴⁰⁰ Indeed, the court expressed some exasperation at such challenges to the validity of the trust process, stating the “many arguments about the invalidity of the trust process, in this instance and in general, must finally be put to rest.”⁴⁰¹

BIA land acquisition policy states:

Land not held in trust or restricted status may only be acquired for an individual Indian or a tribe in trust status when such acquisition is authorized by an act of Congress. No acquisition of land in trust status, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary:

(a) Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status:

- (1) When the property is located within the exterior boundaries of the tribe’s reservation or adjacent⁴⁰² thereto, or within a tribal consolidation area; or
- (2) When the tribe already owns an interest in the land; or
- (3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

(b) Subject to the provisions contained in the acts of Congress which authorize land acquisitions or holding land in trust or restricted status, land may be acquired for an individual Indian in trust status:

- (1) When the land is located within the exterior boundaries of

398. *E.g.*, *Carcieri v. Norton*, 290 F. Supp. 2d 167 (D.R.I. 2003).

399. *United States v. Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999), *cert. denied* 529 U.S. 1108 (2000).

400. *Roberts*, 185 F.3d at 1137.

401. *See id.*; *see also* *McAlpine v. United States*, 112 F.3d 1429 (10th Cir. 1997); *Confederated Tribes of Siletz v. United States*, 110 F.3d 688, 694 (9th Cir. 1997).

402. The term “adjacent” is not defined in law or regulation. In administrative appeals from decisions taking land into trust for tribes, the IBIA has deferred to the Secretary to define the term. *See, e.g.*, *Edwards v. Portland Area Dir.*, 29 IBIA 12, 16 (1995); *Cross v. Acting Portland Area Dir.*, 23 IBIA 149 (1993) (proposed acquisition was located about one-half mile from the reservation); *McCloud v. Acting Portland Area Dir.*, 23 IBIA 203, 204 (1993) (proposed acquisition was located within a twenty-mile radius of the reservation); *Maahs v. Acting Portland Area Dir.*, 22 IBIA 294 (1992) (proposed acquisition was separated by a thirty-foot-wide road from the reservation).

an Indian reservation, or adjacent thereto; or
(2) When the land is already in trust or restricted status.⁴⁰³

A proposed land acquisition is examined under different criteria depending on whether the land is located contiguous to or within an Indian reservation⁴⁰⁴ or outside of and noncontiguous to a reservation.⁴⁰⁵ “Indian reservation” includes that area of land constituting the former reservation of an Oklahoma tribe.⁴⁰⁶

The decision to acquire land into trust for a tribe is one within the discretion of the Secretary after due consideration of the factors set forth in the regulations.⁴⁰⁷ After the agency has considered the applicable factors, the proper standard for reviewing an agency’s discretionary decision is to determine whether the agency acted in a manner which is arbitrary, capricious, an abuse of discretion, or otherwise not in

403. 25 C.F.R. § 151.3 (2004).

404. 25 C.F.R. § 151.10 provides that:

Upon receipt of a written request to have lands taken in trust, the Secretary will notify the state and local governments having regulatory jurisdiction over the land to be acquired, unless the acquisition is mandated by legislation. The notice will inform the state or local government that each will be given 30 days in which to provide written comments as to the acquisition’s potential impacts on regulatory jurisdiction, real property taxes and special assessments. If the state or local government responds within a 30 day period, a copy of the comments will be provided to the applicant, who will be given a reasonable time in which to reply and/or request that the Secretary issue a decision. The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status when the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated:

- (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
- (b) The need of the individual Indian or the tribe for additional land;
- (c) The purposes for which the land will be used;
- (d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;
- (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
- (f) Jurisdictional problems and potential conflicts of land use which may arise; and
- (g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.
- (h) The extent to which the applicant has provided information that allows the Secretary to comply with the National Environmental Policy Act.

405. 25 C.F.R. § 151.11 (2004). Section 151.11 criteria includes the factors enumerated under Section 151.10 as well as the location of the land in relation to state borders and reservation boundaries, the anticipated economic benefits to the tribe if the land is for business use, and state and local government concerns as to the acquisition’s potential impacts on regulatory jurisdiction and property taxes.

406. § 151.2(f).

407. *McAlpine v. United States*, 112 F.3d 1429, 1433-35 (10th Cir. 1997).

accordance with law.⁴⁰⁸

The IBIA has described its standard of review and the burden of proof in trust acquisition cases as follows:

[D]ecisions as to whether or not to take land into trust are discretionary. The Board does not substitute its judgment for BIA's in decisions based upon an exercise of discretion. Rather, the Board reviews such decisions "to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of its discretionary authority, including any limitations on its discretion established in regulations."⁴⁰⁹

Most appeals from decisions to take land into trust come from local governments that fear a loss of jurisdiction over the land, a loss of tax revenue,⁴¹⁰ or that the land may be put to an objectionable use such as gaming. Mere speculation that a tribe might at some future time attempt to use trust land for gaming purposes does not, however, require the BIA to consider potential gaming in deciding whether to acquire the property in trust.⁴¹¹

The BIA must consider the loss of taxes actually assessed and paid on the property⁴¹² as well as comply with applicable environmental laws, such as the National Environmental Policy Act ("NEPA").⁴¹³ Such review is not required for acquisitions that are made mandatory under a relevant statute, however, since the Secretary's decision is then ministerial rather than discretionary.⁴¹⁴

Appeals from non-governmental parties are usually accompanied by appeals filed by governmental entities. Therefore, the IBIA normally does not address the standing of the non-governmental appellants.⁴¹⁵

408. *Id.*; see also *United States v. Roberts*, 185 F.3d 1125, 1134 (10th Cir. 1999).

409. *City of Lincoln City, Oregon v. Portland Area Dir.*, 33 IBIA 102, 104 (1999), *aff'd*, *City of Lincoln City v. United States Dep't of Interior*, Civil No. 99-330-AS (D. Ore. Apr. 17, 2001).

410. The states have no power to tax Indian trust lands, whether held by the tribe or by an allottee. *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866).

411. See, e.g., *Town of Charlestown, Rhode Island v. E. Area Dir.*, 35 IBIA 93, 103 (2000); *Lake Montezuma Prop. Owners Ass'n, Inc. v. Phoenix Area Dir.*, 34 IBIA 235, 238 (2000); *Town of Ignacio, Colorado v. Albuquerque Area Dir.*, 34 IBIA 37, 41 (1999).

412. See, e.g., *Rio Arriba, New Mexico, Board of County Comm'ns v. Acting Southwest Reg'l Dir.*, 36 IBIA 14 (2001).

413. See, e.g., *John Santana and Virginia Buck v. Sacramento Area Dir.*, 33 IBIA 135, 143 (1999).

414. See *Sac and Fox Nation of Mo. v. Norton*, 240 F.3d 1250 (10th Cir. 2001) (review under National Historic Preservation Act not required where the Secretary has no discretion whether to take land into trust).

415. See *Okla. Petroleum Marketers Ass'n v. Acting Muskogee Area Dir.*, 35 IBIA 285 (2000); *Lake Montezuma Prop. Owners Assoc., Inc. v. Phoenix Area Dir.*, 34 IBIA 235 (2000); *May v. Acting Phoenix Area Dir.*, 33 IBIA 125 (1999).

However, the IBIA has held that a citizens' group lacked standing to challenge an acquisition of land into trust by a tribe.⁴¹⁶ Although state law allows individuals to bring suit in the public interest without requiring them to meet ordinary standing requirements, the Board declined to recognize an appeal made in the capacity of a "private attorney general."⁴¹⁷ The IBIA cannot order the BIA to take land into trust, where the acquisition involves the exercise of discretion.⁴¹⁸ The IBIA lacks the authority to revoke a completed trust acquisition even upon a finding that the transaction did not meet statutory or regulatory requirements.⁴¹⁹ The Secretary may withdraw approval of the trust acquisition at any time prior to acceptance of the deed actually conveying the property to the United States.⁴²⁰

B. Selling or Leasing Indian Lands

Just as federal consent is needed to take land into trust, federal law prohibits the transfer of individual and tribal trust or restricted property without the approval of the Secretary of the Interior.⁴²¹ The Non-Intercourse Act invalidates any conveyance of an interest in tribal lands made without the approval of the United States.⁴²² A party seeking to challenge U.S. title to Indian land pursuant to an unauthorized transfer faces an insurmountable barrier. Congress established the Quiet Title Act of 1972 as the exclusive means to adjudicate a disputed title to real property in which the United States claims an interest.⁴²³ The Quiet Title

416. *Friends of East Willits Valley v. Acting Pac. Reg'l Dir.*, 37 IBIA 213 (2002).

417. *Id.*, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992).

418. *See, e.g., Yerington Paiute Tribe v. Acting W. Reg'l Dir.*, 36 IBIA 261, 264 (2001).

419. *Prieto v. United States*, 655 F. Supp. 1187 (D.D.C. 1987); *see also* *Big Lagoon Park Co. v. Acting Sacramento Area Dir.*, 32 IBIA 309, 323 (1998).

420. *Sycuan Band of Mission Indians v. Acting Sacramento Area Dir.*, 31 IBIA 238 (1997).

421. *See* 25 U.S.C. §§ 177, 348, 464 (2000).

422. 25 U.S.C. § 177 (2000). It is unclear to what extent the Nonintercourse Act applies to tribal fee lands. The Supreme Court applied § 177 to land that the Pueblo Indian tribes of New Mexico held in fee simple under both Spanish and Mexican law before the United States gained control over New Mexico. *See United States v. Candelaria*, 271 U.S. 432, 440-444 (1926); *see also* *United States v. Sandoval*, 231 U.S. 28, 44-48 (1913). Several courts, relying on *Candelaria* and *Sandoval*, have found § 177 applicable to lands that other Indian tribes have purchased in fee simple. *See United States v. 7,405.3 Acres of Land*, 97 F.2d 417, 422 (4th Cir. 1938); *Alonzo v. United States*, 249 F.2d 189, 196 (10th Cir. 1957); *Tonkawa Tribe of Okla. v. Richards*, 75 F.3d 1039, 1045 (5th Cir. 1996). Other courts have held that lands approved for alienation by the federal government and then reacquired by a tribe did not then become inalienable by operation of the Nonintercourse Act. *See, e.g., Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355, 1359 (9th Cir. 1993); *Penobscot Indian Nation v. Key Bank*, 112 F.3d 538, 553 n.18 (1st Cir. 1997). The United States Supreme Court has never directly addressed the issue of whether the Nonintercourse Act applied to land that was rendered alienable by Congress and later reacquired by an Indian tribe. *See Cass County, Minnesota v. Leech Lake Band of Chippewa Indians*, 524 US 103, 115 note 5 (1998).

423. 28 U.S.C. § 2409(a) (2000).

Act displaces APA review of administrative decisions affecting title to land in which the United States claims an interest based on the land's status as trust or restricted Indian land.⁴²⁴ This Act expressly reserves sovereign immunity in disputes involving property held in trust for Indian tribes.⁴²⁵ Preservation of immunity under the Indian lands exception to the Act applies as long as the government has a "colorable claim" regarding its title as trustee to the land at issue.⁴²⁶

Indian trust lands may be sold with the consent of both the owner and the Secretary.⁴²⁷ The Secretary may approve an application to sell Indian land if, after careful consideration of the circumstances, the transaction appears clearly to be justified in light of the long-range best interests of the owner.⁴²⁸ An appraisal is to be obtained prior to approving a sale.⁴²⁹ However, a sale may only be made by advertised sale and not by individually negotiated sale, unless the purchaser pays fair market value and the sale is for a public purpose, to the tribe or another Indian, or the Secretary determines it is impractical to advertise.⁴³⁰ Advertised sales are made by sealed bid and the tribe may match the highest bid.⁴³¹ Thus, the Bureau's regulations normally do not permit a negotiated sale with a non-Indian.⁴³² An individual Indian owner of trust land may, with BIA approval, execute a mortgage or deed of trust to such land. In the event of foreclosure, the Indian owner is treated as if he or she has an unrestricted fee simple title to the land and the United States is not a necessary party to the action.⁴³³

An Indian landowner also may apply to have Indian land removed from trust status. However, an application for a fee patent in order to sell land free of the above restrictions is subject to additional limitations. The Secretary may withhold action on any application which would adversely affect the best interests of other Indians or the tribe until they have had a reasonable opportunity to acquire the land from the applicant.⁴³⁴ Prior to considering such an application, the tribe must be given an opportunity to match the purchase price that has been offered for the trust land

424. *Metro. Water Dist. of S. Cal. v. United States*, 830 F.2d 139, 143 (9th Cir. 1987), *aff'd*, 490 U.S. 920 (1989).

425. 28 U.S.C. 2409(a) (2000); *United States v. Mottaz*, 476 U.S. 834, 843 (1986).

426. *Wildman v. United States*, 827 F.2d 1306, 1309 (9th Cir. 1987).

427. 25 C.F.R. § 152.17 (2004).

428. § 152.23.

429. § 152.24.

430. § 152.25.

431. § 152.27.

432. *See also* 25 U.S.C. § 2216(a) (2000) ("[N]othing in this section shall be construed to apply to or to authorize the sale of trust or restricted lands to a person who is not an Indian.").

433. 25 U.S.C. § 483(a) (2000).

434. 25 C.F.R. § 152.23 (2004).

involved. If the landowner conveys the trust land to another Indian or tribe, the purchaser would be barred for a period of five years from seeking removal of restrictions. Thereafter, the Tribe would again have the right to match any purchase price.⁴³⁵

Federal law generally limits the leasing of Indian lands for any purpose to a maximum term of twenty-five years,⁴³⁶ although there are several exceptions to this rule. The maximum lease term has been extended to ninety-nine years for leases on the Agua Caliente Reservation, the Navajo Reservation, and certain others.⁴³⁷ The Native American Housing Assistance and Self-Determination Act of 1996 (“NAHASDA”)⁴³⁸ authorizes leases for housing development and residential purposes for a primary term of up to fifty years. The maximum primary term for other types of leases remains twenty-five years, and non-agricultural leases may provide for a single renewal period of up to twenty-five years.⁴³⁹ The American Indian Agricultural Resource Management Act of 1993 (“AIARMA”) limits leases of Indian rangeland and farmland to ten years, and up to twenty-five years only where a “substantial investment” is required.⁴⁴⁰

Section 105(c) of AIARMA authorizes the owners of a majority of the trust interests in a tract to grant an agricultural lease or permit, and thus bind the minority owners upon BIA approval.⁴⁴¹ In contrast, Section 219 of the Indian Land Consolidation Act Amendments of 2000 (“ILCA”)⁴⁴² authorizes the owners of a “sliding percentage” of the trust ownership of a given allotment to grant a “non-agricultural” lease, again subject to BIA approval. The “minimum consent” requirement for these “non-agricultural” leases is a bare majority for tracts with twenty or more Indian owners and 90% for tracts with five owners or less.⁴⁴³ In the case of agricultural leases and permits the requisite “majority consent” must come from the Indian landowners themselves, but under the ILCA Amendments the BIA is allowed to also grant consent on behalf of decedents’ estates and owners whose whereabouts are unknown and count those interests toward the applicable “minimum consent”

435. 25 U.S.C. § 2216 (2000).

436. *Id.* § 415.

437. *Id.*

438. *Id.* § 4211.

439. *See id.* § 415.

440. Pub. L. No. 103-177, 107 Stat. 2017, 25 U.S.C. § 3715 (2004); *see also* 25 U.S.C. § 415 (2004).

441. 25 U.S.C. § 3715(c)(2)(A) (2004).

442. *Id.* § 2218.

443. The American Indian Probate Reform Act of 2004 reduced from 100% to 90% the proportion of undivided interests needed for lease consent when there are five or fewer owners. *See* Pub. L. 108-374, Sec. 6(a)(10), to be codified at 25 U.S.C. § 2218(b)(1)(a).

requirement.

Leases of Indian trust lands are subject to the National Environmental Policy Act (“NEPA”)⁴⁴⁴ and other federal land use statutes. Leases which have been granted or approved without proper NEPA documentation have been voided even after the lessee has acted in reliance on the approval.⁴⁴⁵ A State may not levy a tax directly on Indian tribes or their members inside Indian country absent clear congressional authorization. If the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax. Additionally, if the balance of federal, state, and tribal interests favors the State and federal law is not to the contrary, the State may impose its levy.⁴⁴⁶ A state possessory interest tax imposed on the leasehold interest carved from the tax exempt federally owned fee is sufficiently indirect and remote as to be permissible.⁴⁴⁷

BIA regulations for leasing and permitting Indian lands for most purposes are set forth at 25 C.F.R. Part 162. The leasing regulations are broken into general provisions (Subpart A), use-specific provisions relating to agricultural leases (Subpart B), residential leases (reserved - Subpart C), and business leases (reserved - Subpart D), respectively, with the subparts on residential and business leases being reserved for publication at a later date. Pending promulgation of rules for Subparts C and D within Part 162, residential and business leases are covered by Subpart F which incorporates enforcement provisions identical to those found in Subpart B. Regulations for forestry are found in 25 C.F.R. Part 163, grazing permits are found in 25 C.F.R. Part 166, and mineral leasing in 25 C.F.R. Parts 200-227.

C.F.R. Part 162 general leasing regulations specify certain types of land use agreements that are not covered by the regulations, including those covered under separate regulations discussed *infra* for mineral leases,⁴⁴⁸ grazing permits,⁴⁴⁹ timber contracts,⁴⁵⁰ management contracts and joint venture agreements,⁴⁵¹ and easements.⁴⁵² Subpart A specifies

444. 42 U.S.C. § 4321 (2000).

445. *See* Sangre de Cristo Dev. Co. v. United States, 932 F.2d 891 (10th Cir. 1991); *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972).

446. *Okla. Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995). Under this balancing test, the Tenth Circuit has rejected a state fuel tax in favor of the tribe’s interests in raising revenues for essential governmental programs where the tribe’s fuel marketing is integral and essential to customers’ visits to the Tribe’s casino. *Prairie Band Potawatomi Nation v. Richards*, 379 F.3d 979 (10th Cir. 2004).

447. *Palm Springs Spa, Inc v. County of Riverside*, 95 Cal. Rptr. 879 (Cal. Ct. App. 1971).

448. 25 C.F.R. pts. 211-212, 225 (2004).

449. pt. 166.

450. pt. 163.

451. pt. 84.

that only the owner of 100% of the interests in Indian land may take possession of the land without a lease⁴⁵³ and provides for treatment of unauthorized possession as trespass.⁴⁵⁴ In addition to the regulations, leases may be subject to federal laws of general applicability, tribal laws, and if the lease so provides, state laws (not to be confused with jurisdiction).⁴⁵⁵

A common misunderstanding about the role of the Secretary in approving a lease or permit is that the BIA is somehow made a party to the lease. The Supreme Court has ruled otherwise.⁴⁵⁶ The BIA exercises discretion in deciding whether or not to approve a lease of Indian land. However, once a lease has been approved, the parties acquire legal rights under it and a BIA decision concerning the lease must thereafter be based upon the law and the terms of the lease itself.⁴⁵⁷ The IBIA has consistently held that the BIA is bound by the terms of leases it has approved when the leases are not in conflict with governing regulations.⁴⁵⁸ The BIA acts as trustee for the Indian lessor and thus has an affirmative duty to enforce his or her rights. As to the rights of the other parties vis-à-vis each other, the BIA is no more than an adjudicator and acts in this capacity only where necessary to administer the lease.⁴⁵⁹ It is an abuse of discretion, however, for the BIA to withhold approval of assignments or subleases for the sole purpose of permitting Indian lessors to negotiate more favorable lease terms.⁴⁶⁰

The construction of contracts approved on behalf of Indians by the Secretary of the Interior in her fiduciary capacity is a question of federal law. The federal statutes and regulations governing the leasing of Indian lands constitute a comprehensive regulatory scheme which preempts the application of state and local laws.⁴⁶¹ Leases disguised as another type of agreement nevertheless require BIA approval and without such approval they are void, according rights to neither party.⁴⁶² Acceptance of rentals

452. pt. 169.

453. 25 C.F.R. § 162.104.

454. § 162.106.

455. § 162.109.

456. *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 371 (1968) (“Although the approval of the Secretary is required, he is not the lessor.”).

457. *E.g.*, *Racquet Drive Estates, Inc. v. Deputy Assistant Secretary–Indian Affairs (Operations)*, 11 IBIA 184 (1983).

458. *E.g.*, *Kearny Street Real Estate Co. v. Sacramento Area Dir.*, 28 IBIA 4 (1995); *Am. Indian Land Dev. Corp. v. Sacramento Area Dir.*, 23 IBIA 208 (1993); *Abbott v. Billings Area Dir.*, 20 IBIA 268 (1991).

459. *E.g.*, *Candelaria v. Sacramento Area Dir.*, 27 IBIA 137 (1995).

460. *See Woods Petroleum Corp. v. Dep’t of Interior*, 47 F.3d 1032 (10th Cir. 1995).

461. *Segundo v. City of Rancho Mirage*, 813 F.2d 1387 (9th Cir. 1987).

462. *Naegele Outdoor Adver. Co. v. Acting Sacramento Area Dir.*, IBIA 92-211-A (1993); *see also* *Bulletproofing, Inc. v. Acting Phoenix Area Dir.*, 20 IBIA 179 (1991); *Smith v. Acting Billings*

by the lessor subsequent to default on specific provisions of the lease by the lessee does not constitute waiver of the items in default, in the absence of showing that the lessor voluntarily and intentionally waived the requirements under the lease.⁴⁶³

The BIA may collect reasonable fees in connection with work performed for individual Indians or tribes to be paid by vendees, lessees, or assignees or deducted from the proceeds of sales, leases, or other sources of revenue.⁴⁶⁴

C. Agricultural Lease Regulations

The agricultural lease regulations provide that leases must conform to any agricultural resource management plan developed by the tribe having jurisdiction over the land.⁴⁶⁵ Leases may be negotiated directly with the landowners subject to BIA approval. The BIA will assist potential lessees upon request, including providing the names and addresses of the Indian landowners.⁴⁶⁶ Normally, the BIA will advertise Indian land for agricultural leases.⁴⁶⁷ Approval by a majority of ownership interests must be obtained in order to lease fractionated land.⁴⁶⁸ The BIA may consent on behalf of persons who have been declared *non compos mentis* for undetermined heirs, for persons whose whereabouts are unknown, for orphaned minors, for those who have given the BIA a power of attorney, and for owners who have been unable to agree on a lease for three months where the land is not being used by any of them.⁴⁶⁹

The BIA must determine by any appropriate valuation method the fair market rental of the land before approval of a lease unless the lease may be approved at less than fair market rental.⁴⁷⁰ A lesser amount may be permitted when payment is based on percentage of income or under special circumstances where nominal rent is appropriate.⁴⁷¹ Before

Area Dir., 17 IBIA 231 (1989); *see also* United States v. Emmons, 351 F.2d 603 (9th Cir. 1966) (an unapproved "side agreement" to extend a five-year lease of restricted Indian lands in Palm Springs held void for all purposes).

463. Administrative Appeal of Sunny Cove Dev. Corp. v. Flora Cruz, 3 IBIA 33 (1974).

464. 25 U.S.C. § 413 (2000); *see also* Welk Park N. v. Acting Sacramento Area Dir., Bureau of Indian Affairs, 29 IBIA 213 (1996) (discussing history of fees statute and corresponding regulations in a case involving tribal fees).

465. 25 C.F.R. § 162.201 (2004).

466. § 162.206.

467. § 162.212.

468. § 162.207(c).

469. § 162.209.

470. § 162.211.

471. § 162.222.

approval, the BIA must review the lease, status of any legal entities, bond if required, environmental reports, and compliance with tribal law.⁴⁷² The lease becomes effective upon BIA approval unless by its terms it is made effective at some past or future time (not more than one year after approval).⁴⁷³ Approval is effective immediately notwithstanding appeal.⁴⁷⁴

There are no standard lease forms.⁴⁷⁵ Certain provisions are required pertaining to enforceability by the United States, trust status of the land, and compliance with applicable laws.⁴⁷⁶ The lease must identify the landowners and their respective interests, be executed by those with binding authority, and cite regulatory authority for approval.⁴⁷⁷ The lease must include a legal description or other sufficient description and must identify any fee interests.⁴⁷⁸

A lease must provide for payment of fair market rental at the beginning of the lease term and at specified times during the lease except where the tribe has negotiated the rent for tribal land or where the tenant is a member of the landowners' immediate family, a co-owner in the lease tract, or has some other special relationship or circumstances exist that the BIA deems sufficient to warrant approval.⁴⁷⁹ Fair market rental, if based on a fixed amount, must be reviewed for possible adjustment at least every fifth year.⁴⁸⁰

Rental payments are due when specified by the lease regardless of whether notice is received and may not be paid more than one year in advance.⁴⁸¹ The lease must specify what interest and penalties may apply and notice will not be required unless so provided by the lease.⁴⁸² The lease must specify to whom rent is to be paid.⁴⁸³

The term of an agricultural lease is limited to ten years, unless a substantial investment is required, in which case the term may be for up to twenty-five years.⁴⁸⁴ A lease may be amended, assigned, sublet or mortgaged if the required landowners' consents are obtained and the BIA

472. § 162.213, .214.

473. § 162.215.

474. § 162.216.

475. § 162.218.

476. § 162.219.

477. § 162.220.

478. § 162.221.

479. § 162.222.

480. § 162.223.

481. § 162.224.

482. § 162.225.

483. § 162.226.

484. § 162.229.

finds the amendment to be in the best interests of the landowners.⁴⁸⁵ A lease may designate a representative, including the BIA, to consent to an amendment, but such representative may not consent to an amendment that would reduce payments to the landowners, terminate or modify the term of the lease or the lease area.⁴⁸⁶

Construction of improvements under an agricultural lease will not require consent, approval or amendment of the lease as long as they are generally described in the lease.⁴⁸⁷ The lease must specify who will own any improvements at the end of the lease, providing for them to remain on the premises in satisfactory condition, or for their timely removal.⁴⁸⁸

Leases must require lessees to indemnify the United States and landowners from any loss or liability resulting from lessee's use of the premises and from any hazardous materials on the premises, regardless of fault.⁴⁸⁹ Unless otherwise specified in a lease the landowners are entitled to any payments arising from actions that diminish the value of the land or improvements such as insurance proceeds, trespass damages or condemnation awards.⁴⁹⁰

Leases may provide for negotiated remedies in the event of lease violations, to be exercised in addition to the BIA's right of cancellation, but must specify how landowners may exercise those remedies. Leases may provide for resolution through a court of competent jurisdiction or alternative dispute resolution, although the BIA may not be bound by such decisions made in such forums.⁴⁹¹ A lessee must provide a bond unless otherwise specified by the tribe or a majority of landowners.⁴⁹² The lease may require the lessee to maintain insurance with the landowner and the United States as additional insured parties.⁴⁹³

The BIA may charge administrative fees for each approval of a lease, amendment, assignment, sublease or related document.⁴⁹⁴ The BIA may issue rent due notices but the lessee's obligation to pay is independent of receipt of any such notice.⁴⁹⁵ Upon lessee's failure to pay rent in a timely manner the BIA will send notice of a violation of the lease. Failure to cure within the time provided may result in cancellation of the lease or

485. § 162.230, 162.242-162.244.

486. § 162.230.

487. § 162.232.

488. § 162.233.

489. § 162.238.

490. § 162.239.

491. § 162.240.

492. § 162.234.

493. § 162.237.

494. § 162.241.

495. § 162.247.

other remedies available under the lease or applicable law.⁴⁹⁶ The regulations establish a schedule of fees for delinquent rental payments.⁴⁹⁷ In the event of a lease violation, the BIA will provide notice, consult with the landowners, and determine whether to cancel the lease or pursue other remedies, pending appeal rights under 25 C.F.R. Part 2.⁴⁹⁸

Although the bond provisions of 25 C.F.R. Part 2 will not apply to appeals from lease cancellation decisions, the BIA may require the lessee to post an appeal bond; if the bond is not posted, the BIA may dismiss the appeal.⁴⁹⁹ A cancellation decision will be stayed if the lessee perfects an appeal under Part 2.⁵⁰⁰ The BIA may take emergency action to protect the leased premises from immediate and significant harm.⁵⁰¹

D. Residential and Business Lease Regulations

On February 10, 2004, the BIA published its Proposed Rule for Residential and Business Leases. This Rule would replace Subpart F with the new Subparts C, Residential Leases, and D, Business Leases.⁵⁰² Subpart F currently provides general leasing regulations for all non-agricultural leasing but does not differentiate between business and residential leases. Although the Proposed Rule treats these two types of leases separately many of the provisions are common to both business and residential leases. Subpart A of the General Provisions is modified to define several new terms. The definition of “Immediate Family,” for example, is expanded to include “when some other special relationship exists between the lessor and the lessee or special circumstances exists (sic) that in the opinion of the Secretary warrant the approval of the residential lease”⁵⁰³

The regulations cover ground leases as well as leases of developed land. Leases which authorize the construction of single-family homes and public housing are covered by the residential lease regulations while leases for multi-family developments and for single family residential developments for profit are covered under the business regulations.⁵⁰⁴

496. § 162.248.

497. § 162.249.

498. § 162.252.

499. § 162.253.

500. § 162.254.

501. § 162.255.

502. See Vol. 69 Fed. Reg. 6499-6524 (2004) [hereinafter, *Proposed Rule for Residential and Business Leases*]. Some changes in the proposed rules are likely to be made before they are published in final form.

503. *Proposed Rule for Residential and Business Leases*, supra note 502, to be codified at 25 C.F.R. § 162.101.

504. § 162.300, .400.

Leases may be negotiated directly with the landowners subject to BIA approval. The BIA will assist upon request including providing the names and addresses of the Indian landowners.⁵⁰⁵

Approval by the required percentage of ownership interests must be obtained in order to lease fractionated land.⁵⁰⁶ If there are five or less owners, 100% of the ownership interests must approve; if there are five to ten owners, 80% of the interests must approve; if eleven to nineteen owners, 60% approval is required; if twenty or more owners exist, over 50% approval must be obtained. Although the intent of the regulation is that the percentage of undivided interests is counted, rather than the percentage of owners, the actual wording of the regulation is contradictory.⁵⁰⁷ The BIA may consent on behalf of undetermined heirs, whereabouts unknown, legal disability, orphaned minors, power of attorney, and those owners who, after notice, are unable to agree on a lease for three months and are not using the land.⁵⁰⁸

The BIA must determine by any appropriate valuation method the fair market rental of the land before approval of a lease even if the lease is approved at less than fair market rental. The BIA must use an appraisal for a business lease, except that a tribe may waive appraisal of tribal land for residential or business leases.⁵⁰⁹ Before approval, the BIA must review the lease, status of any legal entities, bond if required, environmental reports, and compliance with tribal law.⁵¹⁰ The BIA must determine in writing that the lease is in the best interests of the landowners. The BIA will act on complete lease proposals within thirty days for residential and sixty days for business. Denial or inaction is subject to appeal under Part 2 of 25 C.F.R.⁵¹¹ The lease becomes effective upon BIA approval, unless by its terms it is made effective at some past or future time, but not more than one year after approval.⁵¹² Approval is effective immediately notwithstanding appeal.⁵¹³

There are no standard residential or business lease forms.⁵¹⁴ Certain provisions are required, however, pertaining to enforceability by the United States, trust status of the land, and compliance with applicable

505. § 162.302, .402.

506. § 162.303, .403.

507. § 162.304, .404. This likely will be corrected in the final regulations. Additionally, the final regulations presumably will reflect a reduction to 90% in the consent required for a lease when there are five or fewer owners, as provided by the American Indian Probate Reform Act of 2004.

508. *Id.*

509. § 162.307, .407.

510. § 162.308, .408.

511. § 162.309, .409.

512. § 162.310, .410.

513. § 162.311, .411.

514. § 162.313, .413.

laws.⁵¹⁵ The lease must identify the landowners and their respective interests, be executed by those with binding authority, and cite regulatory authority for approval. Signatures on a business lease, in addition, may be required to be notarized or witnessed by two individuals.⁵¹⁶ The lease must include a legal description or other sufficient description, and must identify any fee interests.⁵¹⁷

A residential lease must provide for payment of fair market rental at the beginning of the lease and at specified times during the lease except where the tribe has negotiated the rent for tribal land, or where the tenant is a member of the landowners' immediate family, a co-owner in the lease tract, or some other special relationship or circumstances exist that the BIA deems sufficient to warrant approval.⁵¹⁸ A business lease must provide for initial payment of fair market rental, based on a fixed amount, a percentage of income, or a combination of both, except where the tribe has negotiated the rent for tribal land or where the tenant is a member of the landowners' immediate family, a co-owner in the lease tract or a participant in a joint venture with the landowners. The lease may provide for reduced rent in pre-development and construction periods. Non-consenting minority owners must be paid fair market rental. Fair market rental, if based on a fixed amount, must be reviewed for possible adjustment at least every fifth year.⁵¹⁹

Residential lease rent adjustments are required only as provided in the lease.⁵²⁰ Business lease rental adjustments required by the BIA must be specified in the lease.⁵²¹ Rental payments are due when specified by the lease, regardless of whether notice is received, and may not be paid more than one year in advance.⁵²² The lease must specify what interest and penalties may apply and notice will not be required unless so provided by the lease.⁵²³ The lease must specify to whom rent is to be paid.⁵²⁴

The term of a residential lease is limited to fifty years, including renewals, unless otherwise provided by statute. The term of a business

515. § 162.314, .414.

516. § 162.315, .415.

517. § 162.316, .416.

518. § 162.317.

519. § 162.417.

520. § 162.318.

521. § 162.418. It has sometimes been BIA practice to peg periodic rental adjustments to a percentage of the assessed value of the land. Investors generally prefer a standard inflationary index, with a maximum and minimum percentage increase, so that they can more accurately forecast business expenses.

522. § 162.319, .419.

523. § 162.320, .420.

524. § 162.321, .421.

lease is limited to twenty-five years, plus a twenty-five year renewal, unless otherwise provided by statute. Leases of land on certain reservations, including the Agua Caliente Band of Cahuilla Indians, are authorized for up to ninety-nine years.⁵²⁵

A lease may be amended if the required landowners' consents are obtained and the BIA finds the amendment to be in the best interests of the landowners.⁵²⁶ A business lease may designate a representative, including the BIA, to consent to an amendment but such representative may not consent to an amendment that would reduce payments to the landowners, terminate or modify the term of the lease or the lease area.⁵²⁷

Leases may be assigned without the consent of the landowners if specified in the lease and the assignee agrees to assume the lessee's obligations. Whereas assignment of a business lease requires BIA approval a residential lease may be assigned without BIA approval if the assignee is a leasehold mortgagee that agrees any tenant will be a tribal member, tribal housing authority, or the tribe. If none of these wish to lease the property the lease may be transferred to another Indian, consistent with tribal law; if none is available the lease may be transferred to a non-Indian consistent with tribal law.⁵²⁸

A lease may provide for subleasing without the consent of the landowners when the lease is part of a residential or commercial development for which the BIA has approved a general plan and sublease form. The lease may provide that BIA approval of a sublease is not required. If a residential lease was approved at less than fair market rent and the sublessee is not a co-owner or member of the landowners' immediate family the sublease must require fair market rent.⁵²⁹ Leases may be mortgaged without the consent of the landowners if specified in the lease and approved by the BIA.⁵³⁰ The BIA will take action on a business lease amendment, assignment, sublease or mortgage within sixty days of receipt.⁵³¹

Construction of improvements under a residential lease will not require consent, approval or amendment of the lease as long as they are generally described in the lease. Similarly, a business lease must describe any improvements to be constructed and must also provide a construction schedule approved by tribal officials.⁵³² The lease must specify who will

525. § 162.324, .424.

526. § 162.325, .326.

527. § 162.425, .426.

528. § 162.327, .427.

529. § 162.328, .428.

530. § 162.329, .430.

531. § 162.434.

532. § 162.333, .436.

own any improvements at the end of the lease, providing for them to remain on the premises in satisfactory condition, or for their timely removal. A business lease may provide for reimbursement of the residual value of the improvements.⁵³³

Leases must require lessees to indemnify the United States and landowners from any loss or liability resulting from lessee's use of the premises and from any hazardous materials on the premises regardless of fault. Under a business lease there is no such indemnity with respect to hazardous materials if the liability arises from the gross negligence or willful misconduct of the landowner.⁵³⁴ Unless otherwise specified in a residential lease, the landowners are entitled to any payments arising from actions that diminish the value of the land or improvements such as insurance proceeds, trespass damages or condemnation awards. Business leases must specify the distribution of such payments.⁵³⁵

Leases may provide for negotiated remedies in the event of lease violations, to be exercised in addition to the BIA's right of cancellation, but must specify how landowners may exercise those remedies. Leases may provide for resolution through a court of competent jurisdiction or alternative dispute resolution although the BIA may not be bound by the decisions made in such forums.⁵³⁶ The business lease regulation explains that BIA may not be bound by such decisions, for example, where such a resolution would diminish the BIA's trust responsibilities or violate federal law.⁵³⁷ A lessee must provide a bond unless otherwise specified in the lease and if it's determined by the BIA to be in the best interest of the landowner.⁵³⁸ The lease may require the lessee to maintain insurance with the landowner and the United States as additional insured parties.⁵³⁹

The BIA may charge administrative fees for each approval of a lease, amendment, assignment, sublease or related document.⁵⁴⁰ The BIA may issue rent due notices but the lessee's obligation to pay is independent of receipt of any such notice.⁵⁴¹ Upon lessee's failure to pay rent in a timely manner the BIA will send notice of a violation of the lease. Failure to cure within the time provided may result in cancellation of the lease or other remedies available under the lease or applicable law.⁵⁴² The

533. § 162.334, .437.

534. § 162.335, .438.

535. § 162.336, .439.

536. § 162.337, .440.

537. § 162.440.

538. § 162.338, .441.

539. § 162.341, .444.

540. § 162.342, .445.

541. § 162.343, .446.

542. § 162.344, .447.

regulations establish a schedule of fees for delinquent rental payments.⁵⁴³ In the event of a lease violation, the BIA will provide notice, consult with the landowners, and determine whether to cancel the lease or pursue other remedies pending appeal rights under Part 2.⁵⁴⁴

Although the bond provisions of Part 2 will not apply to appeals from lease cancellation decisions the BIA may require the lessee to post an appeal bond. If the bond is not posted, the BIA may dismiss the appeal.⁵⁴⁵ A cancellation decision will be stayed if the lessee perfects an appeal under Part 2.⁵⁴⁶ The BIA may take emergency action to protect the leased premises from immediate and significant harm.⁵⁴⁷ If the lease provides an option for early termination it must specify the manner and time in which it may be exercised. A lease may be mutually terminated by lessee and the applicable percentage of landowners required for approval, subject to BIA approval.⁵⁴⁸

If a residential lessee fails to diligently develop or abandons the leased premises the lessee and its sureties continue to be responsible for their obligations under the lease. The residential lease may specify a time after which the leased premises must be developed or a period of non-use after which the premises will be considered abandoned. There are no such rules for business leases other than the general statement that abandonment of the premises does not relieve the lessee and its sureties of obligations under the lease.⁵⁴⁹

E. Grazing Permits

Regulations for Grazing Permits on Indian Lands are found in separate subparts for management planning, trespass, and agriculture education.⁵⁵⁰ Most disputes regarding grazing permits have to do with the rental rate. In reviewing a grazing rental rate adjustment or rental value determination the IBIA does not substitute its judgment for that of the BIA. Instead, it reviews the BIA's decision to determine whether it is reasonable; that is, whether it is supported by law and by substantial evidence. The burden is on the appellant to show that the BIA's action is unreasonable. The BIA may set a rental rate at the start of a new grazing term where the rate is supported by substantial evidence, however,

543. § 162.345, .448.

544. § 162.348, .451.

545. § 162.349, .452.

546. § 162.350, .452.

547. § 162.351, .453.

548. § 162.353, .454.

549. § 162.354, .457.

550. 25 C.F.R. pt. 166 (2004).

grazing permits with terms of five years or less are not subject to an increase in the grazing rental rate even where the permit provides otherwise.⁵⁵¹

Trespass is another issue that arises with regularity on Indian grazing lands. The BIA has jurisdiction to enforce trespass regulations for any unauthorized use or occupation of Indian lands.⁵⁵² A tribe may also assume direct responsibility for enforcement of federal regulations found at 25 C.F.R. Part 166 Subpart I – Trespass, which provides for concurrent tribal jurisdiction.⁵⁵³ The BIA may respond to a trespass on Indian agricultural lands by impounding livestock or other property involved in the trespass and assessing damages and penalties.⁵⁵⁴ The BIA determinations of trespass are not subject to administrative appeal within the agency.⁵⁵⁵

F. Indian Forest Lands

General forestry regulations are promulgated pursuant to the National Indian Forest Resources Management Act.⁵⁵⁶ The Act directs the BIA to take part in management of Indian forests either directly or through contracts with tribes⁵⁵⁷ and permits the BIA to deduct the cost of its management activities from the proceeds of forest product sales.⁵⁵⁸ The Act also directs the BIA to adopt trespass regulations with tribes having concurrent enforcement authority⁵⁵⁹ and to institute a program of financial support for tribal forestry programs.⁵⁶⁰

Indian forests cover over 17 million acres on 275 reservations in 26 states with a commercial timber volume of approximately 42 billion board feet with an annual allowable harvest of 779 million board feet.⁵⁶¹ The OMB has recommended a reduction in funds for the BIA's forestry program because BIA has not met its harvest goal for the past several years.⁵⁶² The criticism of the BIA seems unwarranted, for as OMB acknowledges, Indian forests often are valued by the tribes for ceremonial or cultural purposes rather than as a source of revenue and

551. Fort Berthold Land and Livestock Ass'n v. Great Plains Reg'l Dir., 35 IBIA 266 (2000).

552. 25 C.F.R. § 166.800 (2004).

553. § 166.802.

554. § 166.806.

555. § 166.805.

556. Pub. L. No. 101-630, 104 Stat. 4532, codified at 25 U.S.C. §§ 3101-3120.

557. 25 U.S.C. § 3104 (2004).

558. § 3105.

559. § 3106.

560. § 3110.

561. OMB PART, *supra* note 350, at 88.

562. OMB PART, *supra* note 350, at 89, 91.

public forests experienced a similar harvest decline in the 1990s as ecological concerns gained ground on timber production goals.⁵⁶³

G. Restricted Lands Held by Members of the Five Civilized Tribes

There are laws peculiar to sale and lease of lands of members of the Five Civilized Tribes. Section 3 of the Act of April 12, 1926 (1926 Act)⁵⁶⁴ provides that the plaintiff, defendant, or intervener to a suit involving restricted lands, including quiet title to restricted lands, can bind the government and all parties by serving notice on the Eastern Oklahoma Regional Director for the BIA. Most commonly, such cases involve actions to quiet title to lands formerly or currently held in restricted status by Five Tribes allottees or their heirs. Other types of cases affected include partition actions, mortgage foreclosures, condemnation actions, and actions to abate nuisances. The Tulsa Field Solicitor may elect to remove the case to the United States District Court for the district within which the subject property is located. Any time restricted Indian property in a partition action goes to forced sale, the Department may exercise a right of preferential purchase.⁵⁶⁵ After partition, the property remains restricted in the hands of a co-tenant of at least one-half Indian blood who elected to take the property. It loses its restricted status if sold by forced sale.

Under Section 1 of the 1947 Act,⁵⁶⁶ state courts have exclusive jurisdiction concerning alienation of property interests inherited from Indian allottees of the Five Civilized Tribes by Indians of a half-blood or more.⁵⁶⁷ This process typically involves petitions filed in state court for the approval of deeds or oil and gas leases previously executed by competent adult Indian landowners.⁵⁶⁸ The Tulsa Field Solicitor appears in these proceedings, on behalf of the Secretary of the Interior, to protect the interests of the Indian petitioners.⁵⁶⁹ In addition, the Tulsa Field

563. OMB PART, *supra* note 350, at 90, 92.

564. 44 Stat. 239.

565. 25 U.S.C. § 503 (2004); 25 C.F.R. § 16.5 (2004).

566. Act of August 4, 1947, 61 Stat. 733 (1974).

567. *See generally*, Tim Vollman and Sharon Blackwell, *Fatally Flawed: State Court Approval of Conveyances by Indians of the Five Civilized Tribes—Time for Legislative Reform*, 25 TULSA L.J. 1 (1989).

568. *Id.* Vollman and Blackwell, both former Associate Solicitors for Indian Affairs, argue for long overdue reform of a statutory scheme that is cumbersome, expensive, confusing, and—since the process requires the attorney for the grantee or lessee to file the petition for approval on behalf of the Indian landowner—fraught with ethical problems.

569. A federal court found a government trial attorney negligent in failing to properly represent an Indian landowner in one such state court proceeding for approval of an oil lease and awarded the Indian substantial monetary damages. The Court also found the entire state court approval process to be “fatally flawed” stating that “[t]here is no justification for the Department of

Solicitor has discretionary authority under Section 4 of the 1947 Act to appear and represent any restricted member of the Five Civilized Tribes in the courts of the State of Oklahoma in any other matter in which the restricted Indian may have an interest.⁵⁷⁰

H. Alaska Native Landholding

Congress created a unique system of landholding for Alaska Natives that was completely unlike anything that had ever been a part of federal Indian policy.⁵⁷¹ Not being a military threat to an expanding nation, Alaska Natives initially escaped the various policies that had whittled away at Indian landholdings in the mainland. The earliest statement of federal policy toward Alaska Natives was contained in the 1867 Treaty of Cession from Russia which proclaimed that “the uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.”⁵⁷² The Alaska Organic Act of 1884 provided that “the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.”⁵⁷³

Alaska Natives became eligible for allotments in 1906⁵⁷⁴ and for townsite plots in 1926.⁵⁷⁵ The Supreme Court held in 1955 that Alaska Natives retained aboriginal rights to lands subject to extinguishment by the federal government without compensation.⁵⁷⁶ The Alaska Statehood

the Interior to permit this kind of procedural masquerade wherein the government’s trial attorneys know first-hand that the private attorneys filing these petitions are bought and paid for by the Indian’s adversary, i.e. the private attorneys’ fiduciary client.” *Walker v. United States*, 663 F. Supp. 258, 262-63 (E.D. Okla. 1987). Although the Office of the Solicitor added certain procedural safeguards in the aftermath of *Walker*, Congress has not seen fit to change the statutory scheme. A comprehensive reform measure backed by the Cherokee Nation sailed through the House in 2002, however, Senator Inhofe of Oklahoma blocked its passage at the request of the Oklahoma Corporation Commission and oil and gas industry. *Five Nations Citizens Land Reform Act*, H.R. 2880, 107th Congress -1st Session; *Indian land bill aground, Inhofe says*, DAILY OKLAHOMAN, October 18, 2002, available at <http://olive.newsok.com/archive/Skins/ArchiveSearch/navigator.asp?skin=ArchiveSearch&BP=OK>; see also, *Land Reform Act*, at <http://www.chadsmith.com/land.htm>.

570. See also 25 C.F.R. § 16.3 (2004).

571. Federal Indian policy as applied to Alaska Natives has been subject to much criticism. See, e.g., Marilyn J. Ward Ford, *Twenty Five Years of the Alaska Native Claims Settlement Act: Self Determination or Destruction of the Heritage, Culture, and Way of Life of Alaska’s Native Americans?* 12 J. ENVTL. L. & LITIG. 305 (1997).

572. 15 Stat. 539, 542 (1867).

573. 23 Stat. 24, 26 (1884).

574. 34 Stat. 197 (1906).

575. 44 Stat. 629 (1926).

576. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

Act disclaimed state title to lands held by natives but also allowed the state to select large tracts from the vacant public lands.⁵⁷⁷ Finally, in 1971, the Alaska Native Claims Settlement Act (“ANCSA”)⁵⁷⁸ extinguished Alaskan aboriginal title and created a unique system of Native landholding.

ANCSA authorized Native groups to select large parcels of public land in or near Native villages and individual Natives to claim homesites of up to 160 acres.⁵⁷⁹ The Act provided for establishment of regional corporations throughout the State in which individual Natives would receive corporate stock.⁵⁸⁰ Native villages within each region formed village corporations⁵⁸¹ which acquired title to the surface of lands selected within each respective region⁵⁸² whereas the regional corporations acquired the mineral rights.⁵⁸³ The Native corporations received their land in fee although later amendments have provided some protections against involuntary alienation.⁵⁸⁴

A 1980 statute, the Alaska National Interest Lands Conservation Act (“ANILCA”), attempted *inter alia* to protect subsistence hunting and fishing uses of Alaska Natives.⁵⁸⁵ ANILCA also granted many of the land claims that had remained pending under the Allotment Act of 1906.⁵⁸⁶ Legislative approval of a Native allotment application pursuant to ANILCA precludes any inquiry into whether the Native’s use and occupancy of the land was sufficient to entitle the Native to approval of the allotment.⁵⁸⁷

The BLM has determined that preference rights to Native allotments took precedence over subsequent state right-of-way claims.⁵⁸⁸ In an Appeal from a decision of the BLM’s Alaska State Office declaring a right-of-way null and void in part, the IBLA held that the failure of the State of Alaska to appeal a decision finding a native allotment to be legislatively approved by the State prohibits a subsequent challenge to

577. 72 Stat. 339 (1958).

578. 43 U.S.C. §§ 1601-1628 (2004).

579. § 1613.

580. § 1606.

581. § 1607.

582. § 1611.

583. § 1606.

584. § 1636.

585. § 3101.

586. § 1643(a) (1994).

587. Bristol Bay Native Corp., 153 IBLA 309 (2000) (rejecting a regional corporation selection application for a cemetery site/historical place to the extent it includes land within a legislatively approved Native allotment application).

588. Alaska v. Babbitt, 75 F.3d 449 (9th Cir. 1995); Alaska v. Babbitt (Albert Allotment), 38 F.3d 1068 (9th Cir. 1994).

any of the predicate facts determined by BLM in its initial decision.⁵⁸⁹ However, a highway right-of-way grant for land which was withdrawn and the withdrawal then converted to an easement reserved for highway purposes is a valid existing right to which a native allotment is subject where the use and occupancy began after the land was withdrawn.⁵⁹⁰

I. Navajo and Hopi Relocation

In the 1934 Navajo Reservation Act, Congress sought to consolidate and enlarge the Navajo Reservation by appropriating all vacant, unreserved, and unappropriated lands within certain boundaries.⁵⁹¹ Included in the land set aside was the Hopi Reservation established by Executive Order in 1882. Subsequent litigation between the tribes led to a ruling that they were joint owners of approximately 1.8 million acres of land since known as the Joint Use Area.⁵⁹²

The Navajo-Hopi Land Settlement Act of 1974⁵⁹³ led to further litigation and eventual partition of the area.⁵⁹⁴ It also created the Navajo and Hopi Indian Relocation Commission⁵⁹⁵ which assumed from the BIA all responsibility to assist in the relocation of Indian households and their livestock from lands partitioned to the tribe of which they are not members.⁵⁹⁶ DOI regulations govern the manner in which the Commission carries out the relocation provisions of the law.⁵⁹⁷ Relocation has long been a highly controversial and heart-wrenching issue for the tribes involved as well as for policy-makers and other observers.⁵⁹⁸

J. Easements, Rights-of-Way, and Indian Roads

The 1887 General Allotment Act explicitly reserved the power of

589. State of Alaska, Dep't of Transp. & Pub. Facilities, 154 IBLA 57 (2000).

590. *Id.*

591. Ch. 521, 48 Stat. 960 (1934).

592. *Healing v. Jones*, 210 F. Supp. 125 (D. Ariz. 1962), *aff'd* 373 U.S. 758 (1963).

593. The Act of December 22, 1974, Pub. L. No. 93-531, 88 Stat. 1712, as amended by Pub. L. No. 96-305, 94 Stat. 929, Pub. L. No. 100-666, 102 Stat. 3929, codified at 25 U.S.C. § 640(d).

594. *See, e.g.,* *Sekaquaptewa v. MacDonald*, 626 F.2d 113 (9th Cir. 1980).

595. 25 U.S.C. § 640(d)(11) (2004).

596. § 640(d)(13). Most of those to be relocated are Navajo living on the Hopi Partitioned Land. At this time, there are approximately 146 households that remain to be relocated, of which 13 are full-time residents on the Hopi Partitioned Land. A total of 3,370 families have been relocated from the Hopi Partitioned Land. House Rpt.108-542, Department of the Interior and Related Agencies Appropriation Bill, 2005.

597. *See* 25 C.F.R. pt. 700 (2004).

598. *See, e.g.,* Hollis A. Whitson, *A Policy Review of the Federal Government's Relocation of Navajo Indians under P.L. 93-531 and P.L. 96-305*, 27 ARIZ. L. REV. 371 (1985).

Congress to grant rights-of-way through Indian lands for railroads and highways, for other public uses, and to condemn such lands.⁵⁹⁹ Congress exercised this power in a series of enactments over the following several decades. A statute adopted in 1899 authorized the Secretary of the Interior to grant rights-of-way over Indian lands, except in Oklahoma, for railroads, telegraph and telephone lines.⁶⁰⁰ The authority was extended to the granting of rights-of-way for highways in 1901.⁶⁰¹ Another 1901 statute authorized rights-of-way for telephone and telegraph lines in general⁶⁰² and yet another 1901 law granted to states the power to condemn the trust lands of individual Indians for public purposes in federal court.⁶⁰³ Ten years later, Congress authorized Interior to grant fifty-year rights-of-way over Indian lands for electric power and communication lines and poles.⁶⁰⁴ The Federal Power Act authorizes the Federal Energy Regulatory Commission (“FERC”) to grant rights-of-way for hydroelectric dams and transmission lines but permits Interior to place conditions on such licenses.⁶⁰⁵

In 1948, Congress enacted a series of general statutes to govern all of the rights-of-way on Indian lands except for hydroelectric projects that remained under FERC jurisdiction.⁶⁰⁶ Under these statutes, tribal consent is required for a right-of-way across tribal lands.⁶⁰⁷ Indians must be justly compensated for grants of rights-of-way.⁶⁰⁸ The BIA has promulgated regulations to implement the array of statutes governing grants of rights-of-way.⁶⁰⁹

Rights-of-way granted under the earlier statutes are unaffected by the 1948 enactments.⁶¹⁰ A 1904 law limited the terms of pipeline rights-of-way granted under that statute to a term of twenty years with the possibility of renewal for another twenty years.⁶¹¹ The 1948 enactment contains no term limitations.⁶¹² The Ninth Circuit Court of Appeals

599. 25 U.S.C. § 341 (2004).

600. § 312.

601. § 311. In *U.S. v. Oklahoma Gas & Electric Co.*, 318 U.S. 206 (1943), this statute served as sufficient authority for the addition of electric power lines within such highway right-of-way.

602. 25 U.S.C. § 319 (2004).

603. § 357; *see also* *Town of Okemah v. United States*, 140 F.2d 963 (10th Cir. 1944).

604. 43 U.S.C. § 961 (2004).

605. 16 U.S.C. § 797(e) (2004). *See* *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 104 S.Ct. 2105 (1984).

606. 25 U.S.C. §§ 323-328 (2004).

607. § 324. The statute refers only to tribes organized under the IRA, however, BIA has extended the requirement to all tribes. *See* 25 C.F.R. § 169.3 (2004).

608. 25 U.S.C. § 325 (2004).

609. 25 C.F.R. pt. 169 (2004).

610. 25 U.S.C. § 326 (2004).

611. The Act of March 11, 1904, ch. 505, 33 Stat. 65, as amended, 25 U.S.C. § 321.

612. The Act of February 5, 1948, ch. 45, 62 Stat. 17, 25 U.S.C. §§ 323-28. Federal

rejected a challenge to BIA approval of a rights-of-way under the latter statute rather than limiting it to twenty years in accordance with the 1904 Act. In a case which concerned a challenge by the Blackfeet Tribe to five pipeline rights-of-way approved between 1961 and 1969, the Ninth Circuit Court of Appeals held that the two statutes co-existed and that BIA had properly approved the rights-of-way for fifty year terms under the 1948 Act in accordance with consent given by the Tribe.⁶¹³

Where a public road had been opened within the Crow Reservation pursuant to approval given by the DOI in 1934, the IBIA found that a telephone company had a right to place a buried telephone cable in the road right-of-way in accordance with Montana law without obtaining the approval of any DOI official or the consent of the owners of trust land crossed by the right-of-way.⁶¹⁴ This ruling was in keeping with prior decisions of federal courts interpreting rights of way granted under different statutory authority.⁶¹⁵

The Supreme Court has held that tribes do not retain jurisdiction over non-Indian use of public roads maintained pursuant to a state right-of-way.⁶¹⁶ BIA roads, on the other hand, are considered tribal roads and thus tribes retain jurisdiction.⁶¹⁷ The BIA constructs such roads on reservations “to provide an adequate system of road facilities serving Indian lands.”⁶¹⁸ A BIA road is considered an “Indian reservation road”⁶¹⁹ even where a road serves both Indian and non-Indian land⁶²⁰ and even though BIA roads are generally open to public use.⁶²¹ An “Indian reservation road” serving Indian land and held in trust for a tribe is a “tribal road.”⁶²²

The BIA has published a final rule establishing new policies and

regulations, however, limit the terms of pipeline rights-of-way to fifty years with the possibility of renewal for another fifty years. 25 C.F.R. § 161.19 (2004).

613. *Blackfeet Indian Tribe v. Mont. Power Co.*, 838 F.2d 1055 (9th Cir.), *cert. denied*, 488 U.S. 828 (1988).

614. *Colleen Simpson v. Rocky Mountain Reg'l Dir.*, 37 IBIA 182 (2002).

615. *Okla. Gas & Elec. Co.*, 318 U.S. 206, 209-210 (1943); *United States v. Mountain States Tel. & Tel. Co.*, 434 F. Supp. 626, 626 (D. Mont. 1977).

616. *Strate v. A-1 Contractors*, 520 U.S. 438, 442, 456 (1997).

617. *McDonald v. Means*, 309 F.3d 530 (9th Cir. 2002).

618. 25 C.F.R. § 170.3 (2004). BIA also operates a small Indian Highway Safety Grant Program. *See* 25 C.F.R. pt. 181 (2004).

619. 25 C.F.R. § 170.1 (2004).

620. § 170.7.

621. § 170.8.

622. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (noting in the context of federal preemption that the Court saw “no basis, and respondents point to none, for distinguishing between roads maintained by the Tribe and roads maintained by the Bureau of Indian Affairs.”). The Ninth Circuit also equated a BIA road with a tribal road in *Allstate v. Stump*, 191 F.3d 1071, 1072 (9th Cir. 1999) (describing an accident on Route 9, a BIA road, as occurring “on a tribal road in the Rocky Boy Reservation.”).

procedures governing the Indian Reservation Roads (IRR) Program. The rule expands transportation activities available to tribes and tribal organizations and provides guidance for planning, designing, constructing, and maintaining transportation facilities. It also establishes a funding distribution methodology called the Tribal Transportation Allocation Methodology.⁶²³

K. Indian Irrigation Projects

Regulations governing the operation and maintenance of various Indian Irrigation Projects⁶²⁴ are found in 25 C.F.R. Part 171. The regulations vest a great deal of responsibility and discretion in the “Officer in Charge” (normally the Agency Superintendent or Project Engineer)⁶²⁵ for setting rates,⁶²⁶ establishing the irrigation season,⁶²⁷ determining whether to provide domestic and stock water,⁶²⁸ establishing delivery points,⁶²⁹ distribution and apportionment of water,⁶³⁰ recording irrigation water deliveries,⁶³¹ management of surface drainage,⁶³² construction and maintenance of facilities,⁶³³ preparation of annual project crops and statistical reports,⁶³⁴ carriage agreements and water rights applications,⁶³⁵ recording assessments and payments,⁶³⁶ and enforcing health and sanitation standards.⁶³⁷ Irrigation water normally will not be delivered until the Indian landowner or lessee has paid or made satisfactory arrangements for payment of annual operations and maintenance assessments.⁶³⁸ Disputes are subject to the Part 2 appeals procedures.⁶³⁹

Individual regulations are set forth respectively designating Pueblo Indian lands benefited by irrigation and drainage works of the Middle

623. See “Indian Reservation Roads Program” (RIN: 1076-AE17), 69 Fed. Reg. 43090 (July 19, 2004).

624. *E.g.* 25 U.S.C. § 385 (2004).

625. 25 C.F.R. § 171.1 (2004).

626. § 171.1(e).

627. § 171.2.

628. § 171.3.

629. § 171.5.

630. § 171.6.

631. § 171.7.

632. § 171.8.

633. § 171.9.

634. § 171.13.

635. § 171.14.

636. § 171.20.

637. § 171.21.

638. § 171.17, .19.

639. § 171.23.

Rio Grande Conservancy District, New Mexico;⁶⁴⁰ governing concessions, permits and leases on lands withdrawn or acquired in connection with the San Carlos, Fort Hall, Flathead and Duck Valley or Western Shoshone irrigation projects;⁶⁴¹ and for the use and distribution of the San Carlos Apache Tribe Development Trust Fund and Lease Fund.⁶⁴² The Indian Dams Safety Act of 1994 requires the BIA to ensure the long term maintenance and safety of some fifty-three dams on Indian lands that provide flood control and water for irrigation, municipal, industrial, domestic, livestock, recreation, and for fish and wildlife habitats.⁶⁴³

L. Indian Water Rights

The BIA regulations do not address the subject of Indian water rights nor are they defined by statute. The BIA performs a limited role in assisting tribes to litigate or more often seek to settle their water rights claims.⁶⁴⁴ In some cases, the BIA has been given a role in assisting tribes to implement a water rights settlement.⁶⁴⁵

State courts have jurisdiction to adjudicate federally-reserved water rights under a 1952 law known as the McCarran Amendment.⁶⁴⁶ This jurisdiction extends to adjudication of rights held by the United States as trustee for Indian water rights although subject to federal substantive law.⁶⁴⁷

The source of Indian water rights is found in the 1908 Supreme Court decision of *Winters v. United States*⁶⁴⁸ which held that the creation of the Fort Belknap Indian Reservation in Montana under a treaty entered into in 1888 by necessity implied the reservation of sufficient water rights to fulfill the purposes of the reservation.⁶⁴⁹ The Court revisited this

640. 25 C.F.R. pt. 172; 45 Stat. 312.

641. pt. 173.

642. pt. 183; San Carlos Apache Tribe Water Settlement Act, Pub. L. No. 102-575, 106 Stat. 4748.

643. Pub. L. No. 103-302, 108 Stat. 1560, 25 U.S.C. §§ 3801-3804.

644. *See, e.g.*, 25 C.F.R. § 89.41 (2004). This regulation provides for the discretionary grant of funds to pay tribal counsel in limited circumstances. Ordinarily, the DOJ represents the tribes as trustee, however, tribes often feel this representation is inadequate. *See, e.g.*, *Arizona v. California*, 460 U.S. 605, 613-15 (1983).

645. *See, e.g.*, Fort hall Indian Water Rights Settlement, Pub. L. No. 101-602, 104 Stat. 3059 (1990).

646. 43 U.S.C. § 666 (2004).

647. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983).

648. 207 U.S. 564, 576.

649. *See, e.g.*, David H. Getches, *Legal History: The Unsettling of the West: How Indians Got The Best Water Rights*, reviewing Indian Reserved Water Rights: The Winters Doctrine in its Social

holding in 1963 when it ruled in the case of *Arizona v. California* that the creation of reservations for tribes along the Colorado River similarly implied a reservation of water sufficient to irrigate all of the “practicably irrigable acreage” on the reservations.⁶⁵⁰

Despite the method of measuring these so-called “Winters” rights, Indian tribes are free to use their water for other than agricultural purposes⁶⁵¹ including maintenance of fish habitat.⁶⁵² Allotment of tribal lands resulted in the transfer of tribal water rights to the allottees.⁶⁵³ A non-Indian who succeeds to the allotment also acquires water rights although their nature is changed in some respects.⁶⁵⁴ Indian water rights may be leased to non-Indians along with a lease of Indian lands.⁶⁵⁵

The Arizona Supreme Court has concluded that federal reserved rights apply to both surface and subsurface sources of water, and that federal reserved rights enjoy greater protection from groundwater pumping than do state water rights.⁶⁵⁶ The Wyoming Supreme Court had earlier declined to apply *Winters* rights to groundwater.⁶⁵⁷ It is likely that the Supreme Court will ultimately decide this question.⁶⁵⁸

M. Federal Landlord

Perhaps more than anything else, the BIA is regularly criticized with respect to its management of Indian lands. States are often upset because Indian lands are not within their tax base and regulatory jurisdiction. Tribes and individual beneficial owners sometimes complain that the BIA approval they require in order to develop their lands seems to be arbitrarily withheld or inordinately delayed. Third parties who wish to lease Indian lands many times are frustrated by what appear to be arcane rules and bureaucratic procedures (although they often escape even more burdensome state regulation).

Reform of BIA’s leasing regulations, now underway, could help to

and Legal Context, 1880s-1930s, *By John Shurts*, 99 MICH. L. REV. 1473 (2001).

650. 373 U.S. 546, 601 (1963).

651. *Arizona v. California*, 439 U.S. 419, 421-22 (1979).

652. *See, e.g.*, *United States v. Adair*, 723 F.2d 1394, 1408-11 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984); *But see In re. Big Horn River Sys.*, 835 P.2d 273 (Wyo. 1992).

653. *See United States v. Powers*, 305 U.S. 527 (1939).

654. *See Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981), appeal after remand, 752 F.2d 397 (9th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986).

655. *See Skeem v. United States*, 273 Fed. 93 (9th Cir. 1921).

656. *In re Gen. Adjudication of the Gila River Sys.*, 195 Ariz. 411, 422, 989 P.2d 750 (1999).

657. *In re Gen. Adjudication of Big Horn River Sys.*, 753 P.2d 76, 99-100 (Wyo. 1988).

658. *See generally*, Debbie Shosteck, *Beyond Reserved Rights: Tribal Control over Groundwater Resources in a Cold Winters Climate*, 28 COLUM. J. ENVTL. L. 325 (2003).

resolve some of these problems. Despite their exhaustive detail, the regulations currently do little to limit the discretion of BIA officials to withhold approval for various types of land use. Whereas BIA officials must protect against the improvident conveyance of property interests, if their only incentive is to avoid such acts, the natural tendency is to be conservative in the extreme. As a result, Indian lands may go unused and the owners receive no benefit. Amendments to the leasing regulations that would require the BIA to act within specified timelines may be helpful in this regard.

The BIA also appears to lack the resources to effectively monitor and enforce compliance with its land use regulations and leases. Especially in complex leases, where rents may be based on a percentage of income (with an alternative minimum), the BIA and the landowners must provide for regular audits to ensure that trespass by non-Indians, particularly on agricultural lands, also continues to be a major problem.

VII. INDIAN ENERGY AND MINERALS

A. *Indian Mineral Leasing Act*

The primary authorization for leasing of Indian minerals is the Indian Mineral Leasing Act (IMLA) of 1938.⁶⁵⁹ The IMLA provides that “unallotted lands within any Indian reservation” or otherwise under federal jurisdiction “may, with the approval of the Secretary . . . be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians.”⁶⁶⁰ The Act aims to provide Indian tribes with a profitable source of revenue and to foster tribal self-determination by giving Indians a greater say in the use and disposition of the resources on their lands.

Unlike federal statutes and regulations that invest the BIA with overall responsibility for management of certain Indian resources, such as those pertaining to timber management that were at issue in *Mitchell II*,⁶⁶¹ the IMLA and its implementing regulations merely requires Federal *approval* of the lease negotiated between the parties. Thus, even where the Secretary failed to obtain the highest possible royalty rate for the tribe in a coal mining lease with a third party, the Supreme Court held in *United States v. Navajo Nation* that the United States was not liable in

659. 25 U.S.C. § 396(a)-396(g). In addition, all leases of coal on Indian lands must comply as well with the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 25 U.S.C. §§ 1201-1215 and regulations promulgated at 30 C.F.R. pt. 750 (2004).

660. 25 U.S.C. § 396(a) (2004).

661. *Mitchell v. United States*, 463 U.S. 206 (1983) (*Mitchell II*).

damages to the tribe.⁶⁶²

B. IMLA regulations

The DOI's IMLA regulations at 25 CFR Part 200 govern leases and permits for the development of Indian tribal oil and gas, geothermal, and solid mineral resources. Tribal mineral resources are governed by regulations at Part 211 whereas Part 212 regulations govern individual Indian minerals. There are separate regulations, in addition, for leasing and development of energy and minerals for specific tribes, including members of the Five Tribes of Oklahoma,⁶⁶³ the Osage Nation,⁶⁶⁴ and the Wind River Reservation.⁶⁶⁵ Some of these regulations are long out-of-date, such as those concerning lead and zinc mining operations and leases at the Quapaw Agency.⁶⁶⁶

The BLM is responsible for resource evaluation, approval of drilling permits, mining and reclamation, production plans, mineral appraisals, inspection and enforcement, and production verification.⁶⁶⁷ The OSM is the regulatory agency for surface coal mining and reclamation operations on Indian lands.⁶⁶⁸ Within the OSM, the Minerals Management Service ("MMS") is responsible for reporting, accounting, and auditing functions.⁶⁶⁹

BIA regulations recognize that Indian mineral owners may lease their land for mining purposes only with the approval of the Secretary.⁶⁷⁰ Mineral leases must first be offered for bidding at an advertised lease sale although the Secretary may grant tribal mineral owners permission to negotiate leases for minerals other than oil and gas.⁶⁷¹ DOI may also grant geological or geophysical exploration permits with no preference

662. United States v. Navajo Nation, 537 U.S. 488 (2003).

663. 25 C.F.R. pt. 213 (2004).

664. pts. 214, 226.

665. pt. 227.

666. pt. 215. Ironically, these outdated regulations are now at the heart of federal court litigation in which children residing in the vicinity of the Quapaw Indian Reservation in northeastern Oklahoma have sued for damages to their health allegedly caused by toxic wastes left over from mining on Quapaw lands. See Wally Kennedy, *Two More Tar Creek Suits Filed*, JOPLIN GLOBE, July 20, 2004, at http://www.joplinglobe.com/story.php?story_id=122253; Omer Gillham, *Tar Creek youths named plaintiffs*, TULSA WORLD, July 7, 2004, at A1. The BIA and several mining companies have also been identified as potentially responsible for helping to clean up the forty square mile Tar Creek Superfund Site. See generally, *EPA, Interior, Army, to Work Together in Removing Health Risks at Tar Creek, Oklahoma* at http://www.epa.gov/region6/6ra/6ra_tar_creek.htm.

667. 25 C.F.R. §§ 211.4, 212.4 (2004).

668. §§ 211.5, 212.5.

669. §§ 211.6, 212.6.

670. §§ 211.20, 212.20.

671. *Id.*

rights to development and with all data to be shared with DOI and the Indian mineral owner.⁶⁷² Lessees must post a bond and a statewide or nationwide bond may suffice if approved by the Secretary.⁶⁷³ A lessee may acquire more than one lease but no single lease may exceed 2,560 acres for coal and 640 acres for oil and gas and all other minerals.⁶⁷⁴ Nondiscriminatory state gross production and excise taxes on petroleum production may be imposed on the lessee of mineral rights in restricted Indian lands.⁶⁷⁵

Leases are for a primary term of ten years and normally continue as long thereafter as the minerals specified in the lease are produced in paying quantities.⁶⁷⁶ When an oil and gas lease provides for a primary term and “as much longer thereafter as oil and/or gas is produced in paying quantities” the lease expires by operation of law when production ceases and not because of any action taken by the BIA.⁶⁷⁷

The BIA is not required to follow lease cancellation procedures when giving notice that a lease has expired by operation of law.⁶⁷⁸ Where a lease had expired by operation of law for non-production, the Board held it could not have been validated by lessee’s subsequent payment of annual rent to Minerals Management Service. The IBIA expressed some discomfort, however, noting:

[I]t is not clear from the record in this case how the three Interior bureaus involved in Indian oil and gas leasing (i.e., BIA, MMS, and the Bureau of Land Management) communicate with each other concerning cases like this. It seems possible that MMS was not aware, when it sent Appellant a bill in September 1999, that BIA was shortly to determine that the lease had expired.⁶⁷⁹

A long period of non-production caused by a mechanical breakdown or accident might excuse non-production had Appellant shown that he had made repairs and resumed production within a reasonable time.⁶⁸⁰ The burden is on the Appellant to show that his period of non-production

672. §§ 211.56, 212.56.

673. §§ 211.24, 212.24.

674. §§ 211.25, 212.25.

675. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).

676. 25 C.F.R. §§ 211.27, 212.27 (2004).

677. *E.g.*, *Oxley Petroleum v. Acting Muskogee Area Dir.*, 29 IBIA 169, 170 (1996).

678. *E.g.*, *Benson-Montin-Greer Drilling Corp. v. Acting Albuquerque Area Dir.*, 21 IBIA 88, 94-95 (1991), *aff’d* *Benson-Montin-Greer Drilling Corp. v. Lujan*, No. CIV-92-210 SC-LFG (D.N.M. Jan. 13, 1993), and cases cited therein.

679. *Dyck v. Acting E. Okla. Reg’l Dir.*, 35 IBIA 250, 4 n.2 (2000).

680. *See, e.g.*, *P & M Drilling, Inc. v. Acting Muskogee Area Dir.*, 33 IBIA 208 (1999), and cases cited therein.

was excusable.⁶⁸¹

The Secretary may approve well spacing and unitization and communitization agreements in the interests of promoting conservation and efficient utilization of minerals.⁶⁸² Provisions of tribal law not inconsistent with federal statutes may supercede DOI's regulations for tribal leases.⁶⁸³ DOI regulations provide minimum royalty rates and rentals, which may be altered by agreement.⁶⁸⁴ The lessee must exercise diligence in prevention of waste⁶⁸⁵ and a lease may be suspended,⁶⁸⁶ surrendered,⁶⁸⁷ assigned,⁶⁸⁸ or cancelled.⁶⁸⁹ The DOI may also impose penalties for violations of the lease or the regulations⁶⁹⁰ which like other DOI decisions may be appealed pursuant to 25 CFR Part 2.⁶⁹¹

The DOI has considerable discretion under the IMLA and DOI regulations regarding the computation of royalty owed on natural gas produced from Indian oil and gas leases.⁶⁹² The six-year statute of limitations for the commencement by the United States of civil actions for money damages⁶⁹³ does not limit administrative action within the DOI such as MMS orders to recalculate and pay additional royalty due under an Indian lease.⁶⁹⁴

Part 216 contains regulations for protection and conservation of non-mineral resources during exploration and production of mineral resources other than oil and gas.⁶⁹⁵ In connection with an application for a permit or lease the BIA conducts a technical examination of the prospective effects of mining on the environment and formulates requirements for protection of non-mineral resources as part of the permit or lease.⁶⁹⁶

681. *E.g.*, *Oxley Petroleum*, 29 IBIA at 171.

682. 25 C.F.R. §§ 211.28, 212.28 (2004).

683. § 211.29.

684. §§ 211.41-43, 212.41-43.

685. §§ 211.47, 212.47.

686. §§ 211.44, 212.44.

687. §§ 211.51, 212.51.

688. §§ 211.53, 212.53.

689. §§ 211.54, 212.54.

690. §§ 211.55, 212.55.

691. §§ 211.58, 212.58.

692. *Supron Energy Corp.*, 46 IBLA 181, 187 (1980); *But see Jicarilla Apache Tribe v. Supron Energy Corp.*, 479 F. Supp. 536, 549-51 (D. N.M. 1979), *aff'd in part, rev'd in part on other grounds*, 782 F.2d 855 (10th Cir.), *cert. denied*, 479 U.S. 970 (1986) (holding that 25 C.F.R. § 211.13(a) required valuation of wet gas produced from an Indian lease on the greater of the value of the gas at the wellhead or the aggregate value of the residue gas remaining after processing regardless of whether the wet gas had been sold before or after being processed into its constituent components).

693. 28 U.S.C. § 2415(a) (1994).

694. *Union Tex. Petroleum Energy Corp.*, 153 IBLA 170 (2000).

695. 25 C.F.R. § 216.2.

696. § 216.4.

Before operations may commence the United States Geological Survey (“USGS”) must approve the exploration plan⁶⁹⁷ and mining plan.⁶⁹⁸ The operator must post a reclamation bond⁶⁹⁹ and submit annual operations reports.⁷⁰⁰ The mining operations are subject to inspection and suspension or cancellation of the permit or lease for noncompliance.⁷⁰¹ BIA decisions are subject to appeal pursuant to 25 CFR Part 2 and USGS decisions may be appealed pursuant to 30 C.F.R. Parts 211 and 231.⁷⁰²

C. Indian Mineral Development Act

Tribes play an increasingly leading role with respect to Indian minerals and national energy policies.⁷⁰³ Congress has recognized the greater role desired by tribes in managing their own resources. The Indian Mineral Development Act of 1982 (“IMDA”)⁷⁰⁴ authorizes agreements for the development of Indian owned minerals whereby the mineral owners have greater control over the mineral leasing. The IMDA permits any tribe, subject to BIA approval, to enter into an agreement for the development of minerals in which the tribe owns an interest.⁷⁰⁵ Such agreements may also include individually owned mineral interests.⁷⁰⁶ Where the BIA has approved a minerals agreement the United States is not liable for any losses sustained by Indian mineral owners under such agreement although the federal trust responsibility remains.⁷⁰⁷ BIA regulations authorized by the IMDA are found at 25 CFR Part 225.⁷⁰⁸

D. Conflicts of Interest

To some, the actions of the Secretary of the Interior in assisting Peabody Coal to negotiate a lower royalty rate with the Navajo Nation may merely confirm the historic inability of the DOI to honor its trust

697. § 216.6.

698. § 216.7.

699. § 216.8.

700. § 216.9.

701. § 216.10.

702. § 216.11.

703. Founded in 1975, the Council of Energy Resource Tribes (“CERT”) is a particularly active tribal alliance that helps its member Tribes to develop their management capabilities and use their energy resources for building self-governing economies. Information about CERT can be located at <http://www.certreearth.com>.

704. 25 U.S.C. §§ 2101-2108 (2004).

705. § 2102(a).

706. § 2102(b).

707. § 2103(e).

708. § 2107.

obligations to Indians when striking bargains with powerful mining interests.⁷⁰⁹ Yet objections to such perceived conflicts are increasingly being voiced by tribes and within the DOI itself. The NCAI, for example, lobbied vociferously against the federal court nomination of a former Solicitor it felt had favored mining and grazing industries over the interests of tribes.⁷¹⁰

Interior's Inspector General, reporting recently on "a series of cases in which we have observed an institutional failure to consider the appearance of conflicts of interest by Interior Department employees and officials," nevertheless spoke expectantly about "changes [in] the ethical culture in the Department."⁷¹¹

VIII. INDIAN PROBATE

A. *Indian Wills and Probate*

The Secretary of the Interior is responsible for the probate of Indian trust property⁷¹² and the review as to form and approval of Indian wills.⁷¹³ The Secretary's probate decisions are "final and conclusive" and reviewable only for constitutional compliance.⁷¹⁴ The Secretary's approval or disapproval of an Indian will is subject to judicial review for abuse of discretion.⁷¹⁵ The review as to form is conducted by the Office of the Solicitor to determine whether or not there are any obvious problems on the face of the will that may render it subject to attack during probate.⁷¹⁶ Approval of the will, subject to appeal, is the responsibility of the Administrative Law Judge, Office of Hearings and Appeals.⁷¹⁷ Claims against the estate are permitted by BIA regulations.⁷¹⁸

709. See, e.g., Judith V. Royster, *Equivocal Obligations: The Federal-Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources*, 71 N.D. L. REV. 327 (1995).

710. See www.ncai.org/news (February 6, 2004, Broadcast 04-010) ("The NCAI's unprecedented opposition to a judicial nominee received interest by the [Senate Indian Affairs] Committee members since the Ninth Circuit Court of Appeals hears a very high number of Indian law cases."); see also Henry Weinstein, *Groups Fight Nominee for 9th Circuit*, L.A. TIMES, Feb. 5, 2004, at A1 (citing opposition to William G. Myers III from "nearly 100 environmental, tribal, civil rights, labor and women's organizations" including the NCAI).

711. Rick Weiss, *Report Critical of Interior Official, Inspector General Calls Deputy Secretary's Dealings Troubling but Not Illegal*, WASHINGTON POST, March 17, 2004, at A23.

712. 25 U.S.C. § 372 (2004).

713. *Id.*

714. *Kicking Woman v. Hodel*, 878 F.2d 1203 (9th Cir. 1989).

715. *Tooahnippah v. Hickel*, 397 U.S. 598 (1970).

716. 43 C.F.R. § 4.260(b) (2004).

717. § 4.202.

718. § 4.250, .252.

The substantive law applied to the inheritance of trust property normally is that of the state where the property is located,⁷¹⁹ subject to federal law described *infra*, and to tribal law with regard to the determination of the legitimacy of heirs⁷²⁰ and validity of adoptions.⁷²¹ Current law provides that interests in trust land may be devised only to another Indian or to the tribe with jurisdiction over the land.⁷²² An attempted devise to a non-Indian conveys only a life estate.⁷²³ The remainder descends to the decedent's Indian spouse or Indian heirs of the first or second degree pursuant to the applicable laws of succession or if there are no such heirs then to collateral heirs who own interests in the land.⁷²⁴ If there are no such heirs, the remainder interest descends to the tribe⁷²⁵ subject to the right of any Indian co-owner of the land to purchase the decedent's interest at fair market value.⁷²⁶ Notwithstanding the foregoing, a testator who does not have an eligible Indian heir may devise his interest to any non-Indian lineal or collateral heir of the first or second degree⁷²⁷ subject to the right of the tribe to purchase such interest at fair market value.⁷²⁸

Rules of intestate succession provide that an interest in trust land may pass only to a decedent's spouse or heirs of the first or second degree.⁷²⁹ A non-Indian heir may acquire only a life estate.⁷³⁰ The remainder from the life estate descends to the decedent's collateral Indian heirs of the first or second degree who own interests in the land.⁷³¹ If there are no such heirs, the remainder interest descends to the tribe,⁷³² subject to the right of any Indian co-owner of the land to purchase the decedent's interest at fair market value.⁷³³

Under the American Indian Probate Reform Act of 2004, Indian landowners will soon have greater flexibility to pass on their property to lineal descendants, tribes will gain the ability to acquire small fractionated interests from individual Indians, a uniform probate code

719. 25 U.S.C. § 348 (2004).

720. § 371.

721. § 372(a).

722. § 2206(a)(1).

723. § 2206(a)(2).

724. § 2206(a)(3).

725. § 2206(a)(4).

726. § 2206(a)(5).

727. § 2206(a)(6)(A).

728. §§ 2206(a)(6)(B), 2205(c).

729. § 2206(b)(1).

730. § 2206(b)(2).

731. § 2206(b)(3).

732. § 2206(b)(4).

733. § 2206(b)(5).

will apply in Indian Country, and there will be increased emphasis on estate planning and the development of wills.⁷³⁴ The Secretary is given 180 days to publish notice of the new law, with most of its provisions becoming applicable one year thereafter.⁷³⁵

Subject to any applicable tribal probate code, the Probate Reform Act permits the owner of a trust interest in land to devise such interest to any lineal descendant; any co-owner of an undivided trust interest in the same parcel of land; the Indian tribe with jurisdiction over the interest in land; or any Indian. A trust interest in land may also be devised as a life estate to any person, with the remainder being devised as stated above, or as a fee interest. Trust personalty may be devised to any person or entity.⁷³⁶

Trust property that is not disposed of by a valid will descends according to an applicable tribal probate code. In the absence thereof, a surviving spouse receives a life estate in the trust lands. Where there is no surviving spouse, or there is a remainder interest, the estate or remainder passes to lineal descendants, parents or siblings. If there are no such eligible heirs, then the estate passes to the Indian tribe with jurisdiction over the lands, except that an Indian co-owner may purchase an interest that would otherwise pass to the tribe.⁷³⁷

Procedurally, when an Indian who owns trust property dies the BIA prepares information on the person's trust estate and family history. The BIA does not have jurisdiction concerning non-trust property that must be probated in tribal or state court. An ALJ holds a probate hearing and issues a decision distributing the trust estate. All trust moneys of the deceased on hand or accrued at the time of death may be used for the payment of claims.⁷³⁸ An interested party who disagrees with the decision must seek a rehearing before the ALJ before appealing to the IBIA.⁷³⁹

In order to increase the efficiency of the probate process the Department has recently adopted new regulations at 25 C.F.R. Part 15. The Agency Superintendent or Attorney Decision-Makers rather than an OHA ALJ may now make initial probate decisions. If the estate is worth less than \$5,000, does not include land, and is not covered by a will, it is handled by the Agency Superintendent pursuant to 43 C.F.R. Part 4,

734. P.L. 108-374, 118 Stat. 1773 (to be codified in scattered sections of 25 U.S.C. §§ 348, 464, 2201).

735. P.L. 108-374, § 8, 118 Stat. 1809.

736. P.L. 108-374, §§ 3, 6(a)(2), (4), (e), 118 Stat. 1774, 1797, 1800, 1805.

737. *Id.*

738. 43 C.F.R. § 4.252 (2004).

739. § 4.21, .320.

Subpart D.⁷⁴⁰

In most other cases the estate will be referred to an Attorney Decision-Maker⁷⁴¹ who may issue a decision or refer it on to OHA after consideration of the following factors. The probate can be referred to OHA if the will disinherits children, is likely to be contested, is complex or ambiguous, is of questionable validity, or the dead person's capacity to make a will is questionable. The probate can also be referred to OHA if there is a contest against a creditor claim or a claim made by a family member. Lastly, the probate can be referred to OHA if there are substantial questions about family relationships, there is a conflict in prior probates, there are evidence problems, the adoption of an heir is questionable, there is a need to establish a presumption of death, there are minor heirs whose rights might be jeopardized, or any interested person is represented by an attorney.⁷⁴²

The DOI does not have jurisdiction concerning probate, leasing or sale of the restricted property of members of the Five Civilized Tribes (Cherokee, Chickasaw, Creek, Choctaw, and Seminole). The Act of April 26, 1906,⁷⁴³ as amended by the Act of May 27, 1908 ("1908 Act"),⁷⁴⁴ requires state court approval of wills of full blood citizens of the Five Tribes, if the will disinherits a spouse, parent or child. The Act of June 14, 1918 ("1918 Act")⁷⁴⁵ provides that a determination of the heirs of a deceased allottee leaving restricted heirs, made by the Oklahoma probate court "having jurisdiction to settle the estate of said deceased and conducted in the manner provided by the laws" of the state "shall be conclusive of said question." The Act of August 4, 1947 ("1947 Act")⁷⁴⁶ provides that the Oklahoma state courts shall have "exclusive jurisdiction" over all proceedings to administer estates or to probate wills of deceased Indians of the Five Tribes and "of all actions to determine heirs arising under section 1 of the Act of June 14, 1918"⁷⁴⁷ Trial Attorneys from the Office of the Tulsa Field Solicitor appear in these proceedings representing the Secretary of the Interior to protect the restricted Indian interests.⁷⁴⁸

If the estate of a deceased Five Tribes citizen contains no restricted land, but consists of a restricted interest in funds not exceeding \$500 on

740. 25 C.F.R. § 15.206 (2004).

741. § 15.301.

742. § 15.205.

743. § 23, 34 Stat. 137 (1906).

744. 35 Stat. 312 (1908).

745. § 1, 40 Stat. 606, (codified at 25 U.S.C. § 375 (2004)).

746. § 3(a), 61 Stat. 731 (1947).

747. *See also* 25 C.F.R. pt. 16 (2004).

748. *See* Vollman & Blackwell, *supra*, note 567.

deposit to the credit of the decedent, a special administrative procedure may be used under certain circumstances so that the funds may be distributed from the decedent's estate.⁷⁴⁹ The Oklahoma state courts have no probate jurisdiction over property held in trust by the United States on behalf of individual Indians. Some citizens of the Five Tribes are the beneficial owners of this type of Indian trust property having acquired the property pursuant to the Oklahoma Indian Welfare Act of 1936⁷⁵⁰ and/or the Indian Reorganization Act of 1934.⁷⁵¹ When trust property is part of the estate of a deceased Five Tribes citizen it is subject to probate pursuant to 43 CFR Part 4.⁷⁵²

Special provisions govern approval of wills executed by members of the Osage Nation. An attorney from the Office of the Tulsa Field Solicitor holds a will hearing and issues a recommended decision to the Superintendent of the Osage Agency. The Superintendent's decision approving or disapproving the will may be appealed to the IBIA.⁷⁵³

Federal law prohibits the devise of trust or restricted property without the approval of the Secretary.⁷⁵⁴ The DOI has long held that trust property cannot be made the subject of an overlying private trust, whether *inter vivos* or testamentary, because doing so would conflict with the federal trusteeship.⁷⁵⁵ DOI regulations on life estates and future interests provide that "State procedural laws concerning the appointment and duties of private trustees shall not apply."⁷⁵⁶ Additionally, the DOI will not recognize the appointment of an executor as to trust property.⁷⁵⁷ In both testate and intestate trust estates, the BIA performs functions that an administrator or executor might otherwise, such as managing the estate pending distribution.

Because the BIA is an interested party in a dispute concerning an estate inventory the IBIA has established a procedure under which alleged errors in the BIA's estate inventory are to be considered during a probate proceeding. The procedure requires that the Administrative Law Judge ("ALJ") notify the BIA when such a dispute arises and invite participation by the BIA. As a part of the order concluding the probate proceedings the ALJ is to issue a recommended decision concerning the disputed inventory following which any interested party (including the

749. 25 C.F.R. § 16.8 (2004).

750. 25 U.S.C. § 501 (2004).

751. *Id.* § 465.

752. 25 C.F.R. § 15.1 (2004).

753. *Id.* pt. 17.

754. *See* 25 U.S.C. §§ 348, 464 (2004).

755. *See, e.g.,* Estate of Arthur, 70 I.D. 24 (1963) (citing 36 Opin. Atty. Gen. 98, 100 (1929)).

756. 25 C.F.R. § 179.3 (2004).

757. *See, e.g.,* Estate of Soulier, 2 IBIA 188, 81 I.D. 95 (1974).

BIA) may file objections with the Board.⁷⁵⁸ The IBIA does not have jurisdiction to entertain an appeal in a probate case unless rehearing has first been sought from the ALJ.⁷⁵⁹

The Department's regulation concerning renunciation of interests provides that "the property so renounced passes as if the person renouncing the interest has predeceased the decedent."⁷⁶⁰ The regulation does not permit an heir to renounce an interest in trust or restricted property in favor of a particular person or persons.⁷⁶¹ The IBIA has held that certain disclaimants, who clearly misunderstood the consequences of their disclaimers, must be given an opportunity to withdraw those disclaimers.⁷⁶²

B. Probate Reform

The descent and distribution of Indian allotments over generations has led to a remarkable splintering of ownership interests to the point that hundreds or even thousands of individuals may own undivided interests in a single parcel.⁷⁶³ The BIA's attempts to manage Indian trust lands and account for the rights of each of the owners is largely what has led to the trust fund mismanagement discussed under Part XVII of this article. Meanwhile, productive use of the land is more and more difficult as the number of owners who must be consulted increases, the cost of administration of the land continues to escalate, and the benefits received by individual owners declines.⁷⁶⁴

There are approximately four million owner interests in the ten

758. Estate of Douglas Leonard Ducheneaux, 13 IBIA 169, 177-78 (1985).

759. See 43 C.F.R. § 4.320 (2004) ("A party in interest shall have a right to appeal to the Board of Indian Appeals from an order of an administrative law judge on a petition for rehearing, a petition for reopening, or regarding tribal purchase of interests in a deceased Indian's trust estate, and also from a summary distribution order made by the Bureau of Indian Affairs or an administrative law judge pursuant to § 4.271."); Estate of Wilford Louie "Hops": Broncho, 36 IBIA 4 (2001); Estate of Thomas Nicholas Black Elk, 34 IBIA 212 (2000), and cases cited therein.

760. 43 C.F.R. § 4.208 (2004).

761. Estate of Gus Four Eyes, 20 IBIA 22 (1991).

762. Estate of Donna Gottschalk, 30 IBIA 82 (1996). Another holding in Gottschalk was later clarified to state that, as to trust property in Alaska, where a disclaimant is a descendant of the decedent and where that disclaimant has descendants the disclaimant's interest passes to the disclaimant's descendants. Estate of Clifford Barney Tulee, Sr., 37 IBIA 235 (2002).

763. Much has been written about the problem of "fractionization." See, e.g., Jessica A. Shoemaker, *Comment: Like Snow In The Spring Time: Allotment, Fractionation, and The Indian Land Tenure Problem*, 2003 WIS. L. REV. 729 (2003); Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1616 (2001) ("As early as 1892, Indian Agents were reporting problems of fractionated heirship."); Katherine R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land Consolidation Act*, 85 IOWA L. REV. 595, 598 (1999); Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 5 (1995).

764. See 25 U.S.C. § 2201(9) (2004) (congressional finding).

million acres of individually owned trust lands and ownership could expand to eleven million interests by the year 2030. There are parcels of land with ownership interests that are less than 0.000002 percent of the whole interest. According to the BIA, it costs an average of \$1,400 to probate a decedent's estate. As of December 31, 2002 there were 1,522 open estate accounts where the funds derived only from per capita or judgment payments (and not income from land interests) with a combined total value of \$7,194. This averages out to under \$5 per account.⁷⁶⁵ The total number cases awaiting probate at the BIA is estimated to be nearing 9,000 with some of these estates dating back to the 1940s.⁷⁶⁶ Indeed, an Indian landowners group testified to Congress that “[t]he 1996 *Cobell* suit could as easily been filed in 1913 when the department had a probate backlog of 40,000 cases involving estate assets worth \$60 million dollars.”⁷⁶⁷

Congress has made a couple of attempts to address this “fractionation” problem only to be rebuffed both times by the Supreme Court. A 1983 law provided that an undivided interest representing less than 2% of an allotted tract and yielding less than \$100 annual income could not pass by intestacy or devise but instead escheated to the tribe.⁷⁶⁸ The Court held the provision to be an unconstitutional taking of property in violation of the Fifth Amendment.⁷⁶⁹ While that case was pending before the Court, Congress – perhaps seeing the writing on the wall – amended the law to require the income of less than \$100 annually to persist over five years, to permit devise and descent of fractional interests to other holders of fractional interests in the same land, and to permit the tribe to adopt alternative remedies with BIA approval.⁷⁷⁰ This law was also held unconstitutional.⁷⁷¹

765. *Testimony of Wayne Nordwall, Director, W. Region Bureau Of Indian Affairs, U.S. Dep't of the Interior: Hearing Before the Senate Comm. on Indian Affairs on S. 550, The American Indian Probate Reform Act of 2003*, 108th Cong. May 7, 2003; see <http://indian.senate.gov/2003hrs/050703hr/nordwall.PDF> (Senate Committee on Indian Affairs, 108th Congress - 1st Session, Hearing List).

766. *Testimony of Cris E. Stainbrook, President of the Indian Land Tenure Foundation: Hearing Before the Senate Comm. of Indian Affairs, Regarding S. 550, The American Indian Probate Reform Act of 2003*, 108th Cong. May 7, 2003; see <http://indian.senate.gov/2003hrs/050703hr/stainbrook.PDF> (Senate Committee on Indian Affairs, 108th Congress - 1st Session, Hearing List).

767. *Testimony of Austin Nunez, Chairman of the Indian Land Working Group: Hearing Before the Senate Committee on Indian Affairs on S. 550, The American Indian Probate Reform Act of 2003*, 108th Cong. Oct. 15, 2003; see <http://indian.senate.gov/2003hrs/101503hr/nunez.PDF> (Senate Committee on Indian Affairs, 108th Congress - 1st Session, Hearing List).

768. Pub. L. No. 97-459, 96 Stat. 2519 (1983).

769. *Hodel v. Irving*, 481 U.S. 704 (1987).

770. Pub. L. No. 98-608, 98 Stat. 3172. Additional minor amendments were made in 1990. Pub. L. No. 101-644, 14 Stat. 4666.

771. *Babbitt v. Youpee*, 519 U.S. 234 (1997).

The attempt to force the uncompensated escheat of fractional interests was repealed in its entirety in 2000.⁷⁷² Meanwhile, there is no lessening of interest in obtaining probate reform.⁷⁷³

The American Indian Probate Reform Act of 2004 continues a program authorized under the Indian Land Consolidation Act of 2000⁷⁷⁴ for federal acquisition of fractional ownership interests in Indian trust lands, to prevent further fractionation and attempt to consolidate land for tribal development. The BIA has been conducting the pilot program in the Midwest Region. The 2003 budget for Indian land consolidation through the acquisition of fractionated ownership interests was about \$8 million. The BIA believes the pilot project has demonstrated that large numbers of owners are willing to sell fractionated ownership interests and that a purchase program can be administered at a reasonable cost. When the projects started there were approximately 87,000 interests on three target reservations. By May of 2003, BIA had purchased over 40,000 interests on those reservations. However, because of the runaway growth of fractionation there was the same number of outstanding interests as when the project began.⁷⁷⁵ It has been conservatively estimated that it would cost approximately \$1.25 billion to buy every fractionated ownership interest that existed in Indian Country.⁷⁷⁶

An OMB review of the purchase program criticized the BIA for carrying substantial fund balances early in the program due to lack of full-time staff available for processing pending applications from an

772. Pub. L. No. 106-462, 114 Stat. 1995.

773. Tribal groups have played a central role in working for legislative reforms, including the American Indian Probate Reform Act of 2004. *See, e.g., Testimony of Austin Nunez, Chairman of the Indian Land Working Group: Hearing Before the Senate Committee on Indian Affairs on S. 550, The American Indian Probate Reform Act of 2003*, 108th Cong. Oct. 15, 2003; *see* <http://indian.senate.gov/2003hrgs/101503hrg/nunez.PDF> (Senate Committee on Indian Affairs, 108th Congress - 1st Session, Hearing List). Regarding the important role played by legal services programs *see* S. 550, the American Indian Probate Reform Act of 2003 and other amendments to the Indian Land Consolidation Act, Hearing before the Senate Committee on Indian Affairs, October 15, 2003 (*Testimony of Lisa C. Oshiro, Directing Attorney California Indian Legal Services*). *See* <http://indian.senate.gov> (Senate Committee on Indian Affairs, 108th Congress - 1st Session, Hearing List). The Indian Land Tenure Foundation is another nonprofit organization that has worked for resolution of the land fractionation issue. *See* www.indianlandtenure.org.

774. Pub. L. No. 106-462, Title I, Sec. 213; *see also* P.L. 108-374, § 6.

775. *Testimony of Wayne Nordwall, Director, W. Region Bureau Of Indian Affairs, U.S. Dep't of the Interior: Hearing Before the Senate Comm. on Indian Affairs on S. 550, The American Indian Probate Reform Act of 2003*, 108th Cong. May 7, 2003; *see* <http://indian.senate.gov/2003hrgs/050703hrg/nordwall.PDF> (Senate Committee on Indian Affairs, 108th Congress - 1st Session, Hearing List).

776. *Testimony of Cris E. Stainbrook, President of the Indian Land Tenure Foundation: Hearing Before the Senate Comm. of Indian Affairs, Regarding S. 550, The American Indian Probate Reform Act of 2003*, 108th Cong. May 7, 2003; *see* <http://indian.senate.gov/2003hrgs/050703hrg/stainbrook.PDF> (Senate Committee on Indian Affairs, 108th Congress - 1st Session, Hearing List).

unanticipated number of willing sellers.⁷⁷⁷ However, cumulative obligations were dramatically increased in 2002 as Midwest agency staff was expanded.⁷⁷⁸ The OMB and other reviews have made a number of recommendations to improve BIA program management and accountability, such as: expanding the land acquisition and consolidation program to other regions and reservations; reducing unobligated fund balances; concentrating acquisitions on owners with active IIM accounts in order to close IIM accounts and thus avoid future probate cases.⁷⁷⁹

Despite its projected costs, the administration has sought to expand the program. As of December 31, 2003 the DOI had purchased 68,938 individual interests equal to approximately 42,075 acres. The DOI is in the process of attempting to expand the program nationwide and plans to enter into agreements with “[t]ribes or tribal or private entities” to carry out aspects of the land acquisition program. The administration’s 2005 budget request included an unprecedented \$75 million for this program⁷⁸⁰ an amount cut in the House appropriations bill from \$28 million to \$42 million.⁷⁸¹

The Five Civilized Tribes of Oklahoma support revision of the uniquely unfair system of probate regarding their members’ restricted property interests asking that it be amended along the lines of probate procedures applicable elsewhere in Indian country.⁷⁸²

IX. FISH AND WILDLIFE

A. *Reserved Rights*

The establishment of a reservation by treaty, statute or agreement includes an implied right of Indians to hunt and fish on that reservation free of state regulation.⁷⁸³ Congress retains the power to regulate such hunting and fishing.⁷⁸⁴ Pursuant to several federal statutes, BIA regulates Indian fishing in Alaska for the Annette Islands Reserve and the Karluck

777. OMB PART, *supra* note 350, at 344.

778. OMB PART, *supra* note 350, at 347.

779. OMB PART, *supra* note 350, at 342-47.

780. *Statement of Ross O. Swimmer, Special Tr. for American Indians, and David W. Anderson, Assistant Sec’y – Indian Affairs, U.S. Dep’t of the Interior: Hearing Before the Senate Comm. on Indian Affairs, on the Trust Initiatives for the 21st Century, March 10, 2004.*

781. H.R. 108-542, Department of the Interior and Related Agencies Appropriation Bill (2005).

782. See *Five Nations Citizens Land Reform Act*, *supra*, note 569.

783. *Menominee Tribe v. United States*, 391 U.S. 404 (1968). A tribe may also reserve by treaty the right to hunt or fish off-reservation. *United States v. Winans*, 198 U.S. 371 (1905).

784. See, e.g., *United States v. Dion*, 476 U.S. 734 (1986) (upholding Eagle Protection Act, 16 U.S.C. § 668(a) (2004)).

Indian Reservation;⁷⁸⁵ commercial fishing on the Red Lake Indian Reservation;⁷⁸⁶ use of Columbia River treaty fishing access sites⁷⁸⁷ and in-lieu fishing sites;⁷⁸⁸ and off-reservation treaty fishing.⁷⁸⁹

B. Tribal Management

Tribes play the leading role in management of their own fish and wildlife resources. They have formed a number of inter-tribal organizations to assist in the administration of fish and wildlife programs. The Native American Fish & Wildlife Society (“NAFWS”) describes itself as “a national tribal organization incorporated in 1983 to develop a national communications network for the exchange of information and management techniques related to self-determined tribal fish and wildlife management.”⁷⁹⁰ According to the Northwest Indian Fisheries Commission (“NWIFC”), it “is a tribal organization established in 1974 to assist tribes in conducting orderly and biologically sound fisheries.”⁷⁹¹ The Great Lakes Indian Fish and Wildlife Commission “is an agency of eleven Ojibwe nations in Minnesota, Wisconsin, and Michigan with off reservation treaty rights to hunt, fish, and gather in treaty-ceded lands.”⁷⁹²

Joining these groups in testifying before the Senate Indian Affairs Committee in one hearing in 2003 were leaders of several individual tribes plus representatives of the Columbia River Inter-Tribal Fish Commission, Upper Columbia United Tribes, Southwest Tribal Fisheries Commission, and other inter-tribal groups. Senator Inouye acknowledged the proliferation of tribal expertise stating that:

Although it is widely recognized that tribal governments and inter-tribal fish and wildlife management organizations have been amongst the most effective stewards of natural resources, both on tribal lands and off, today it is more than ever clear that in many areas of Indian country, tribal governments are on the cutting edge of new technological advances that are assuring enhanced protections for fish and wildlife and plant resources.⁷⁹³

785. 25 C.F.R. pt. 241 (2004).

786. pt. 242.

787. pt. 247.

788. pt. 248.

789. pt. 249.

790. See <http://www.nafws.org>.

791. <http://www.nwifc.wa.gov>.

792. <http://www.glifwc.org>.

793. *The Status of Tribal Fish and Wildlife Management Programs, Oversight Hearing Before*

C. Tribal Consultation

Outside of regulatory measures and technical assistance, the BIA often helps tribes to enforce various rights by obtaining the cooperation of other federal agencies. Pursuant to Executive and Secretarial Orders⁷⁹⁴ tribes must be consulted by federal agencies when the agencies propose to take actions that may adversely affect tribal resources. The Fish and Wildlife Service of the DOI, in particular, is required to consult with tribes prior to designating reservation lands as critical habitat under the Endangered Species Act.⁷⁹⁵ Because such designations may create additional regulatory burdens on tribal governments and may potentially undermine tribal conservation efforts the Secretarial Order requires tribal consultation “at the earliest indication that the need for federal conservation restrictions is being considered for any species” and “cooperative identification of appropriate management measures to address concerns for such species and their habitats.”⁷⁹⁶ Similarly, the Executive Order requires Federal agencies to extend to tribes increased opportunities for waiver of statutory or regulatory requirements.⁷⁹⁷

D. A Question of Priorities

Numerous federal statutes and policies have adopted tribal consultation requirements in recent years,⁷⁹⁸ however, it is unclear whether they accord any substantive rights. Indeed, some critics suggest that such measures may actually undermine the federal trust responsibility by implying that it amounts to no more than a procedural right of access to decision-making.⁷⁹⁹

Notwithstanding a professed deference to tribes, Interior’s land, minerals, water, fish and wildlife agencies have frequently been accused of sacrificing tribal interests in favor of competing agency priorities. The

the Senate Committee on Indian Affairs, June 3, 2003, at <http://indian.senate.gov/2003hrsgs/060303hr/g/Inouye.PDF>, (Vice Chairman Inouye’s Opening Statement).

794. Exec. Order No. 13175 (Consultation and Coordination with Indian Governments) and Secretarial Order No. 3206 (American Indian Tribal Rights, Federal Trust Responsibilities, and Endangered Species Act).

795. 16 U.S.C. § 1533(b) (2004).

796. Secretarial Order No. 3206 (American Indian Tribal Rights, Federal Trust Responsibilities, and Endangered Species Act).

797. Exec. Order No. 13175 (Consultation and Coordination with Indian Governments).

798. See Derek C. Haskew, *Federal Consultation With Indian Tribes: The Foundation Of Enlightened Policy Decisions, Or Another Badge Of Shame?* 24 AM. INDIAN L. REV. 21, n.3 (1999/2000).

799. *Id.*; see also Mary Christina Wood, *Fulfilling the Executive’s Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration’s Promises and Performance*, 25 ENVTL. L. 733, 749 (1995).

Ninth Circuit Court of Appeals castigated the DOI for failing to provide irrigation water to Indian farmers while providing it for non-Indians indicating that this behavior “borders on the shocking.”⁸⁰⁰

More recently, Interior was heartily criticized by Indian tribes for diverting Klamath River water to non-Indian farmers that reportedly killed some 68,000 salmon in the process.⁸⁰¹ A National Marine Fisheries Service (“NMFS”) biologist invoked whistleblower protection status after claiming that the Bureau of Reclamation (“BOR”) suppressed an NMFS report in order to support the DOI’s decision to restore water to the farmers.⁸⁰²

The Supreme Court has acknowledged the difficulty of balancing such competing priorities within a single agency.

[I]t may well be that Congress was requiring the Secretary of the Interior to carry water on at least two shoulders when it delegated to him both the responsibility for the supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands. But Congress chose to do this, and it is simply unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes in litigation when Congress has obliged it to represent other interests as well.⁸⁰³

Some have suggested the Court reasoned that “a lesser standard necessarily applies to the Indian trust duty when the Secretary has to serve competing legitimate public interests.”⁸⁰⁴ Tribal advocates continue to argue that such competing interests should be harmonized with the Indian trust obligation.⁸⁰⁵

800. *Scholder v. United States*, 428 F.2d 1123, 1130 (9th Cir.), *cert. denied*, 400 U.S. 942 (1970); *see also* *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252 (D.D.C. 1972) (overturning a water allocation made by the Secretary as an “accommodation,” without adequate attention to the trust responsibility).

801. *See, e.g.*, Dean E. Murphy, *California Report Supports Critics of Water Diversion*, N.Y. TIMES, Jan. 7, 2003, at A12. The final report of the California Department of Fish and Game found that the fishkill in the Klamath Basin was worse than originally thought, concluding that as many as 68,000 chinook salmon died in September 2002. The report may be seen at <http://www.dfg.ca.gov/html/krfishkill-2004.pdf>.

802. Steve Hyman, *Federal Biologist Invokes Whistleblower Act; He says administration pressure led to river levels too low to protect salmon. A U.S. official says decision relied on “best available science,”* L.A. TIMES, Oct 29, 2002, at B7.

803. *Nevada v. United States*, 463 U.S. 110, 127 (1983).

804. DAVID H. GETCHES *et al.*, FEDERAL INDIAN LAW: CASES AND MATERIALS 342-43 (4th ed., West 1998).

805. *See, e.g.*, Rebecca Tsosie, *Symposium: The Indian Trust Doctrine After The 2002-2003 Supreme Court Term: The Conflict Between The “Public Trust” And The “Indian Trust” Doctrines: Federal Public Land Policy and Native Nations*, 39 TULSA L. REV. 271 (Winter 2003).

X. INDIAN GAMING

A. *The Indian Gaming Regulatory Act*

Observers have noted that “[l]egalized gambling is the fastest-growing industry in the United States (perhaps the world) . . . and Indian casinos are the fastest growing segment of this industry.”⁸⁰⁶ According to federal government statistics, “Indian gaming generated \$12.7 billion in 2001 and accounted for about a quarter of the gaming market in the United States. As recently as 1997, annual gambling revenues were \$7.4 billion, only slightly more than half of the 2001 revenues.”⁸⁰⁷

Perhaps anticipating the explosive growth in Indian gaming, Congress established a comprehensive regulatory scheme in 1998.⁸⁰⁸ The Indian Gaming Regulatory Act (“IGRA”)⁸⁰⁹ created within the DOI a National Indian Gaming Commission (“NIGC”)⁸¹⁰ with broad regulatory powers.⁸¹¹

The Chairman of the Gaming Commission is authorized to issue orders to close gaming activities for substantial violations of the Act⁸¹² and to levy and collect civil fines.⁸¹³ The Chairman also has approval authority for gaming management contracts.⁸¹⁴ Detailed NIGC regulations cover, *inter alia*, approval of Class II and Class III tribal ordinances, management contracts, background investigations of persons having a management interest or management responsibility, internal control standards, monitoring and enforcement, and appeals before the Commission.⁸¹⁵

The IGRA authorizes Indian gaming only on “Indian lands,”⁸¹⁶ defined to include reservation lands and lands held in trust by the United States, as well as “any lands title to which is . . . held by any Indian tribe or individual subject to restriction by the United States against alienation

806. Paul H. Brietzke & Teresa L. Kline, *The Law and Economics of Native American Casinos*, 78 NEB. L. REV. 263 (1999) (citations omitted).

807. Sandra J. Ashton, *The Role of Jurisdiction in the Quest for Sovereignty: The Role of the National Indian Gaming Commission in the Regulation of Tribal Gaming*, 37 NEW ENG. L. REV. 545 (Spring 2003) (citing Tribal Gaming Revenues at <http://www.nigc.gov> (Jan. 27, 2003)).

808. A 1987 decision of the Supreme Court provided an impetus, holding that the State of California was without authority to regulate Indian gaming. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

809. 25 U.S.C. §§ 2701-2721 (2004); 18 U.S.C. § 1166 (2004).

810. 25 U.S.C. § 2704(a) (2004).

811. § 2706.

812. § 2705(a)(1).

813. § 2705(a)(2).

814. § 2711.

815. *See generally* 25 C.F.R. pts. 501-599 (2004).

816. 25 U.S.C. §§ 2710(a), (d)(1) (2004).

and over which an Indian tribe exercises governmental power.”⁸¹⁷ The IGRA forbids gaming on lands away from the tribe’s reservation and placed in trust after 1988, with some exceptions.⁸¹⁸

The IGRA divides Indian gaming into three classes with different regulations for each. Class I gaming consists of “social games for prizes of minimal value or traditional forms of Indian gaming connected with tribal ceremonies or celebrations.”⁸¹⁹ Class I gaming is “within the exclusive jurisdiction of the Indian tribes” and is not regulated by the Act.⁸²⁰

Class II gaming consists of bingo and similar games.⁸²¹ Class II gaming is within the jurisdiction of tribes but is also subject to regulation by the NIGC.⁸²² Tribes may engage in Class II gaming within a state that permits such gaming for any purpose by any person, organization or entity, but it must first have a tribal ordinance approved by the NIGC.⁸²³

Class III gaming is defined as all other forms of gaming including typical casino games such as slot machines and banked card games.⁸²⁴ In order to conduct Class III gaming, a tribe must have a tribal ordinance approved by the NIGC and be located within a state that permits such gaming for any purpose. Additionally, it must enter into a compact with the State that may allocate civil and criminal jurisdiction with respect to such gaming.⁸²⁵

The IGRA authorizes a tribe to bring an action in federal court against a state that refuses to negotiate in good faith for a state-tribal compact.⁸²⁶ The Supreme Court invalidated that provision, however, holding that Congress lacked the power to abrogate state Eleventh Amendment immunity under either the Indian or the Interstate Commerce Clause.⁸²⁷ Ironically, the loss of this remedy opens the door for a tribe that is unable to negotiate with a state to ask the Secretary of the Interior to prescribe regulations governing Class III gaming on the

817. § 2703(4).

818. § 2719.

819. § 2703(6).

820. § 2710(a)(1).

821. § 2703(7).

822. § 2710(a)(2).

823. § 2710(b)(1).

824. § 2703(8).

825. § 2710(d)(1).

826. § 2710(d)(7)(A)(1). The Act also waives tribal sovereign immunity to suit by another tribe or state seeking to enjoin Class III gaming carried on in violation of a tribal-state compact. § 2710(d)(7)(A)(2).

827. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). Whereas *Seminole* dealt with federal court jurisdiction, a subsequent case established that Congress also lacked power to waive a state’s sovereign immunity to suit in state courts. *Alden v. Maine*, 527 U.S. 706 (1999).

tribe's lands.⁸²⁸ Another alternative successfully employed by tribes in some states has been to go around recalcitrant governors and directly to the voters.⁸²⁹

The BIA's role under the IGRA is quite limited. BIA must approve any tribal plan for allocation of revenue if the tribe plans to make per capita payments to its members from net gaming revenues.⁸³⁰ Tribes must first provide for tribal government services, economic and community development, general tribal welfare, charitable donations and any requirements for aid to local governments, before they file with the BIA for a revenue allocation plan.⁸³¹ BIA also promulgates rules for the conduct of Class III Indian gaming when a State and a tribe are unable to voluntarily agree to a compact and the state has asserted its immunity from suit brought by a tribe under the provisions of the IGRA.⁸³²

B. The Impact of Indian Gaming

Congress established the National Gambling Impact Study Commission ("NGISC") in 1996 to conduct a comprehensive legal and factual study of the social and economic implications of gambling in the United States, including impacts on tribal governments.⁸³³ The Commission's report, which was released in 1999, lauds the tremendous social and economic benefits that have resulted from tribal gaming.⁸³⁴ The report notes that gaming has created a substantial number of jobs in depressed communities and that gaming revenues have been used to support tribal governmental services such as tribal courts, utilities, law enforcement, social welfare programs, as well as tribal language, history and cultural programs. In fact, the report states that there "was no evidence presented to the commission suggesting any viable approach to economic development across the broad spectrum of Indian country, in the absence of gambling."⁸³⁵

828. See 25 U.S.C. § 2710(d)(7)(B)(vii) (2004); 25 C.F.R. § 291.3 (2004).

829. See, e.g., *Salt River Pima-Maricopa Indian Cmty. v. Hull*, 190 Ariz. 97, 945 P.2d 818 (1997). An amendment to the California Constitution to permit tribal casinos withstood challenges that it violated IGRA or the Equal Protection Clause. *Flynt v. Cal. Gambling Control Comm'n*, 104 Cal. App. 4th 1125, 129 Cal. Rptr.2d 167 (2002), *cert. denied*, 124 S.Ct. 398 (2003); *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712 (9th Cir. 2003), *cert. denied*, 2004 U.S. Lexis 5595 (2004).

830. See 25 C.F.R. pt. 290 (2004).

831. *Id.* § 290.12. This is a requirement of the statute. 25 U.S.C. § 2710(3) (2004).

832. See generally 25 C.F.R. pt. 291 (2004).

833. Nat'l Gambling Impact Study Comm'n Act, Pub. L. No. 104-169, 110 Stat. 1482 (1996).

834. Nat'l Gambling Impact Study Comm'n, Report of the Nat'l Gambling Impact Study Comm'n (1999).

835. *Id.* at 6-7.

According to the National Indian Gaming Association (“NIGA”), a gambling industry group, tribal gaming produced revenue in 2002 of \$14.5 billion (21% of total gaming industry) and created 400,000 jobs (75% filled by non-Indian employees). The NIGA says less than half of federally recognized Indian Tribes engage in Class II or Class III gaming with no tribal gaming at all in twenty-two states.⁸³⁶ Not all tribes benefit equally from gaming as some tribes choose not to undertake gaming operations,⁸³⁷ whereas others are not so geographically situated as to make gaming profitable. According to NIGC records, “for the fiscal year ending in 2000, 62% of all tribal gaming revenues were generated by only 12% of the gaming operations.”⁸³⁸

An FBI-led working group of federal agencies has formed to protect tribal casinos from theft, embezzlement, fraud, organized crime and corrupting influences. The “Indian Gaming Working Group” was formed in 2003 in response to the growth of Indian gaming from approximately 100 tribes in a \$100 million-a-year industry to 220 tribes and 359 separate sites generating \$15 billion annually (a figure that is expected to exceed \$16 billion in 2004). The figure exceeds the combined gaming revenues of Las Vegas and Atlantic City, according to the Indian Gaming Working Group.⁸³⁹

In spite of the financial success enjoyed by some tribes, critics say gambling money has been bad for tribal members in other ways. In California, several tribes have engaged in intra-tribal membership disputes with some members attempting to strip others of their membership.⁸⁴⁰ The Pechanga Tribe, for example, has disenrolled over 10% of its 1,200 members in a phenomenon that observers say eventually could affect thousands of tribal members. Indian Casinos in California bring in \$4 billion a year with profits going toward health, social, education, and housing programs but also to member per capita payments—in the case of Pechanga amounting to more than \$120,000 a year.⁸⁴¹

Large amounts of gaming funds also have profound effects on the politics of the nation, as demonstrated most shockingly by a recent

836. See <http://www.indiangaming.org>.

837. See, e.g., *Hopis Don't Roll the Dice*, CHRISTIAN SCI. MONITOR, July 29, 2004, at 8.

838. Ashton, *supra* note 807, p. 546.

839. See Jerry Reynolds, *FBI Watchdog Group Galvanizes to Protect Tribal Casinos*, INDIAN COUNTRY TODAY, July 2, 2004, available at <http://www.indiancountry.com/?1088772523>.

840. For more on how Indian gaming may influence tribal membership requirements, see, e.g., Carole Goldberg-Ambrose, *Pursuing Tribal Economic Development at The Bingo Palace*, 29 ARIZ. ST. L.J. 97, 117-18 (1997).

841. See Danna Harman, *Gambling on Tribal Ancestry*, CHRISTIAN SCI. MONITOR, Apr. 14, 2004, at Features-15.

influence peddling scandal in which a powerful Republican lobbyist and his associate reportedly took several tribes for \$66 million in fees, while secretly supporting their gaming opponents and meddling in intra-tribal politics.⁸⁴² The Senate Indian Affairs Committee, the FBI and a task force of five federal agencies are all investigating the scheme, which includes campaign contributions the tribes were told to make to members of Congress.⁸⁴³ The Chairman of the Senate Indian Affairs Committee expressed outrage that the two men “regularly referred to their clients using contemptuous, even racist, language.”⁸⁴⁴

Even prior to the lobbyists’ scandal, some observers had come to perceive gaming tribes as having an undue influence on political campaigns and political deal making.⁸⁴⁵ Such influence may be one reason that public opinion seems to be turning against any further expansion of tribal gaming.⁸⁴⁶ According to one cynical columnist, “[s]ince 1998, casino tribes have spent \$175 million on California elections. No other interest group has come close. Republican and Democratic lawmakers alike receive contributions from the tribes. They don’t directly praise slot machines. Rather, they speak of the sanctity of Indian sovereignty.”⁸⁴⁷

As state governments increasingly look to tribal gaming revenues to shore up state budgets, the political and financial influence wielded by tribes seems likely to grow. For example, California Governor Arnold Schwarzenegger promised in his gubernatorial campaign to solve the State’s financial problems in part by renegotiation of tribal gaming compacts to require tribes to pay their “fair share.” California and other

842. See Susan Schmidt, *Insiders Worked Both Sides of Gaming Issue*, WASHINGTON POST, Sept. 26, 2004, at A1.

843. See, e.g., Thomas Edsall, *Probe to Include GOP Donations*, WASHINGTON POST, May 18, 2004, at A17; see also Susan Schmidt, *Ex-Lobbyist is Focus of Widening Investigations*, WASHINGTON POST, July 16, 2004, at A17.

844. In re Tribal Lobbying Matters, et al., Oversight Hearing Before the Senate Committee on Indian Affairs, Statement of Ben Nighthorse Campbell, Chairman - Committee on Indian Affairs, September 29, 2004 (<http://indian.senate.gov/2004hrs>). Lobbyist Jack Abrahamoff and Public Relations Consultant Michael Scanlon allegedly referred to their tribal employers in internal e-mail messages as “morons,” “idiots,” “troglydites,” “monkeys” and by other derogatory names. See, e.g., Michael Janofsky, *Senate Opens Hearings on Lobbyists for Tribes*, N.Y. TIMES, Sept. 30, 2004, at A26; Susan Schmidt, *Ex-Lobbyist is Assailed at Hearing*, WASHINGTON POST, Sept. 30, 2004, at A4; Doug Abrahms, *Outsiders Involved in Tribal Vote*, DESERT SUN, Oct. 2, 2004, at A1.

845. See, e.g., *Commentary, The Monitor’s View, “Loopy Campaign-Finance Hole,”* CHRISTIAN SCI. MONITOR, March 4, 2002, at Editorial-10 (“When the Senate votes soon on a campaign-finance bill, it should also close a loophole that now allows native American-owned casinos to dole out as much money to candidates as they wish.”); see also, *Native Americans Wield New Political Clout*, CHRISTIAN SCI. MONITOR, Oct. 27, 1999, at USA-3.

846. See, e.g., *No More Casinos*, L.A. TIMES, Sept. 30, 2004, at B10; *2 Bad Bets on Gambling*, S.F. CHRON., Sept. 26, 2004, at E4.

847. Dan Morain, *California on Path to Become Nation’s Gambling Capital*, L.A. TIMES, Aug. 25, 2004, at A1.

states have been criticized for such over-reliance on tribal gaming, especially slot machines, which have been called the “crack cocaine of gambling.”⁸⁴⁸

XI. TRIBAL ECONOMIC DEVELOPMENT

A. *Regulating Commerce with the Indians*

Beginning in 1790, Congress enacted a number of statutes to regulate non-Indian trade with Indians.⁸⁴⁹ Among other things, the Trade and Intercourse Acts limited trade with reservation Indians to those persons licensed by the Commissioner of Indian Affairs.⁸⁵⁰ BIA regulations under these statutes provide for acquiring a license, describe conditions under which a license may be revoked or an unlicensed trader may be excluded, and specify the limited circumstances under which a BIA employee may contract or trade with Indians.⁸⁵¹

The BIA has been criticized for lax enforcement of the statutes, especially in remote areas served by isolated trading posts.⁸⁵² On the other hand, the Senate Indian Affairs Committee has noted that, at least with respect to BIA employees, the laws have become archaic. “Although these statutes served an admirable purpose when enacted in the 1800s, they are now relics of a very different era. The important public purposes served by the original Trading with Indians Act are now adequately protected by the Standards of Ethical Conduct for Employees of the Executive Branch.”⁸⁵³

Businesses operated by non-tribal members on the Navajo, Hopi and Zuni Reservations are subject to detailed regulations that require licenses, consent to the jurisdiction of the tribes, and compliance with certain consumer protection standards.⁸⁵⁴ The “Alaska Resupply Operation” provides consolidated purchasing, freight handling and distribution, and transportation to and from Alaska in support of the BIA’s mission and responsibilities.⁸⁵⁵ BIA may provide power and water utilities or sell other goods and services to non-Federal users in Indian

848. *Lemons in a Row*, N.Y. TIMES, July 13, 2004, at A18; see also Bill Virgin, *Gambling Craze Not a Good Bet for States*, SEATTLE POST-INTELLIGENCER, July 13, 2004, at C1.

849. Ch. 133, 1 Stat. 137.

850. 25 U.S.C. §§ 261, 262, 264 (2004).

851. 25 C.F.R. pt. 140 (2004).

852. See, e.g., Mario Gonzalez, *Regulation of Indian Traders: A Historical Perspective*, Vol. 5 No. 2 AM. INDIAN L. REV. 313 (1978); see also *Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971).

853. SENATE RPT. NO. 104-349 (July 24, 1996).

854. 25 C.F.R. pt. 141 (2004).

855. pt. 142.

country where the goods and services are not otherwise available or it is in the best interests of the Indians.⁸⁵⁶

B. BIA Loans

In the Indian Financing Act of 1974, Congress sought to provide Indians access to loan funds for economic development to raise the standard of living in Indian communities to the equivalent of “that enjoyed by non-Indians in neighboring communities.”⁸⁵⁷ The Act authorized BIA to adopt regulations to carry the programs authorized by Congress into effect.⁸⁵⁸ The regulations provide for loans from an Indian Revolving Loan Fund to “relending organizations” and tribes for a variety of economic development ventures.⁸⁵⁹ BIA may also guarantee or insure any loans made by commercial financial institutions.⁸⁶⁰ The BIA’s Indian Business Development Program makes grants of equity capital to establish and expand profit-making Indian-owned economic enterprises on or near reservations.⁸⁶¹

To maintain the guaranty certificate in full force and effect a lender must follow BIA’s procedures after a borrower defaults on a loan guaranteed by the BIA.⁸⁶² BIA is not required to show specific prejudice resulting from the lender’s failure to follow the procedures.⁸⁶³ Any amounts disbursed for purposes other than those provided in the loan agreement must be excluded in computing the amount for which the lender may be reimbursed in the event of a loss on a loan. There is no liability on the part of the United States to reimburse a lender on a guaranteed loan for that amount of the guaranteed loss caused by the lender’s willful or negligent action that permitted a fraud, forgery or misrepresentation. Even in a case where the BIA has been imprudent a lender is not relieved of its responsibilities under the regulations.⁸⁶⁴

856. pt. 143.

857. 25 U.S.C. § 1451 (2004).

858. § 1469.

859. 25 C.F.R. pt. 101 (2004).

860. pt 103.

861. 25 U.S.C. §§ 1521-1524 (2004); 25 C.F.R. pt. 286 (2004).

862. 25 C.F.R. § 103.36(a) (2004).

863. *Marquette Bank, N.A. v. Acting Dir., Office of Econ. Dev., Bureau of Indian Affairs*, 35 IBIA 161 (2000).

864. *First Nat’l Bank of Pawhuska v. Dir., Office of Econ. Dev., Bureau of Indian Affairs*, 35 IBIA 63 (2000); *Guardian Life Ins. Co. v. Acting Anadarko Area Dir.*, 22 IBIA 104, 115 (1992); *United Nat’l Bank v. Acting E. Area Dir.*, 30 IBIA 272 (1997), *aff’d.*; *United Nat’l Bank v. United States Dep’t of the Interior*, Civ. No. 97-1912 (S.D. Fla. Jan. 29 1998) (The BIA “may assert the defense of negligence to void a guaranty.”).

C. Department of Commerce

The Native American Business Development, Trade, Promotion and Tourism Act of 2000⁸⁶⁵ established an Office of Native American Business Development within the Department of Commerce.⁸⁶⁶ The Secretary of Commerce has the task of coordinating the federal programs relating to Indian economic development including programs of the DOI.⁸⁶⁷ The Act also creates a Native American export and trade promotion program⁸⁶⁸ and tourism program.⁸⁶⁹

The GAO has analyzed all grants made to Indian tribes from 1993-2002 by the Economic Development Administration (“EDA”) within the Commerce Department. Whereas 143 tribes and tribal organizations received \$112 million in EDA grants, this represented a small portion of EDA’s awards to all organizations. The GAO found that tribes have used the EDA grants to create businesses, build roads and other infrastructure, and create economic development plans, but concluded the grants had limited success in generating jobs, income, and private sector investment.⁸⁷⁰

D. Revenue Bonds

Notwithstanding these BIA programs, Indian tribal governments, like state and local governments, must find revenue to pay for capital improvement projects. These projects may be those traditionally considered to be the exclusive province of government, such as schools, roads, sewer and water systems, health and housing facilities, parks, and government administration buildings. They may also be partly commercial, such as a convention center or a sports arena. Governments often use “revenue bonds” to borrow money to finance these activities in anticipation of repayment with future tax revenues or through earnings made possible by the projects themselves.

Although the Indian Tribal Government Tax Status Act of 1982⁸⁷¹ permits tribes to issue tax-exempt revenue bonds, tribal bond proceeds may be used only for “essential government functions.” These are

865. Pub. L. No. 106-464, 114 Stat. 2012; 25 U.S.C. §§ 4301-4307 (2004).

866. 25 U.S.C. § 4303(a)(1) (2004).

867. § 4303(b).

868. § 4304.

869. § 4305.

870. Indian Economic Development: Relationship to EDA Grants and Self-determination Contracting Is Mixed, GAO-04-847, Sept. 8, 2004, at <http://www.gao.gov/highlights/d04847high.pdf>.

871. 26 U.S.C. § 7871 (2004).

generally considered to be such things as government office buildings, schools, streets and sewers. State and local governments, on the other hand, may finance a range of projects such as convention centers, golf courses, and gaming facilities; they may also serve as conduits, in effect loaning the proceeds of the bonds to eligible third parties, such as nonprofit corporations and tribes. Lacking the statutory flexibility of other governments, tribes view conduit financing as an interim solution and are asking Congress to pass the Tribal Tax Exempt Bond Fairness Act that would repeal the “essential government function” test for on-reservation financings.⁸⁷² Meanwhile, some tribes are seeking local government conduit financing of projects including casinos with the local government receiving hefty fees.⁸⁷³

E. Tribal Contracts

The Tribal Economic Development and Contract Encouragement Act of 2000⁸⁷⁴ requires BIA’s approval of contracts that could “encumber” tribal land for a period of seven or more years. The statute requires disapproval if the contract: (1) violates federal law, or (2) does not contain either a remedies provision or a disclosure or waiver of the tribe’s sovereign immunity. The amendment also expressly preserves the “management contract” approval requirements of the National Indian Gaming Commission and any contract approval requirements found in tribal law while eliminating any federal approval requirements for tribal attorney contracts. BIA regulations specify several types of contracts and agreements that do not require Secretarial approval under the Act including those governed under other applicable law or regulations, such as leases of tribal lands.⁸⁷⁵

F. IRA Corporations

Some tribes have taken advantage of a provision of the IRA that allows tribes to form tribal corporations.⁸⁷⁶ Section 17 of the IRA states:

Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage,

872. H.R. 1421, S. 1526.

873. See, e.g., Steve Moore, *Tribe Gets an Ally on Bonds*, PRESS-ENTERPRISE, July 27, 2004, at B01 (“Banning will soon issue \$145 million in tax-exempt bonds to help the Morongo Band of Mission Indians finance a new casino resort. In return, the city gets \$1 million as a fee.”).

874. 25 U.S.C. § 81 (2004).

875. 25 C.F.R. pt. 84 (2004).

876. 25 U.S.C. § 477 (2004).

operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefore interests in corporate property, and such powers as may be incidental to the conduct of the corporate business, not inconsistent with the law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.⁸⁷⁷

The Act provides that a charter may convey to the incorporated tribe the power to acquire, manage, and dispose of property. Federal regulations at 25 C.F.R. Part 162 do not apply to leases of land made under a corporate charter except to the extent that the authorizing statutes require Secretarial enforcement of the leases.⁸⁷⁸

G. *Employment and Labor Laws*

Tribes still face unique issues in pursuing economic development including the determination of what law applies to tribal business ventures. Tribes are excluded from coverage under certain federal employment and labor laws.⁸⁷⁹ Title VII of the Civil Rights Act of 1964 excludes Indian tribes from the definition of employers who may not discriminate on the basis of race, color, religion, sex, and national origin.⁸⁸⁰ Tribes are excluded from the definition of “employer” under the Americans with Disabilities Act that prohibits discrimination on the basis of disability.⁸⁸¹ However, most federal labor statutes are silent as to their applicability to Indian tribes.⁸⁸² Where the statute itself is silent, courts have reached different results in attempting to discern congressional intent regarding application to Indian tribes.⁸⁸³

877. *Id.*

878. 25 C.F.R. § 162.103(a)(4) (2004).

879. *See generally*, Vicki J. Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ. ST. L.J. 681 (Fall 1994); William Buffalo & Kevin J. Wadzinski, *Application of Federal and State Labor and Employment Laws to Indian Tribal Employers*, 25 U. MEM. L. REV. 1365 (Summer 1995).

880. 42 U.S.C. § 2000(e)(b) (2004).

881. *Id.* §§ 12101-12213.

882. *See, e.g.*, Occupation Safety and Health Act, 29 U.S.C. §§ 651-678 (2004); Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2004); Employment Retirement Security Act, 29 U.S.C. §§ 1001-1461 (2004); Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (2004); Family Medical Leave Act, 28 U.S.C. §§ 2601-2604 (2004); Labor Management Relations Act, 29 U.S.C. §§ 141-188 (2004).

883. For decisions declining to apply such statutes to tribes, see, for example, *Reich v. Great Lakes Indian Fish and Wildlife Comm'n*, 4 F.3d 490 (7th Cir. 1993) (FLSA); *EEOC v. Fond du Lac*

In what may foreshadow more widespread application of federal labor laws to tribes, the National Labor Relations Board (“NLRB”) recently ruled that tribal governments and their enterprises might be subject to the National Labor Relations Act (“NLRA”).⁸⁸⁴ Previously, the Board held the NLRA does not apply to tribes.⁸⁸⁵ In light of the expansion of tribal economic development, fueled by the gaming industry, the NLRB now will look at the specific tribal enterprise to determine jurisdiction on a case-by-case basis. The factors the NLRB considers include the nature of the enterprise, whether it is commercial or governmental, and whether the business employs or caters to non-Indians.⁸⁸⁶

H. Unequal Development

The Supreme Court has noted that tribes have increasingly diversified their reservation economies in recent years, citing the growth of “modern, wide-ranging tribal enterprises,” including “ski resorts, gambling, and sales of cigarettes to non-Indians.”⁸⁸⁷ However, the relatively few pockets of prosperity, often fueled by gaming revenues, belie the grinding poverty and unemployment that continues to characterize most of Indian country. As noted by the U.S. Civil Rights commission,

On some reservations, unemployment levels have reached 85%. According to the 2000 census, the average unemployment on reservations is 13.6% more than twice the national rate. Likewise, 31.2% of reservation inhabitants live in poverty and the national poverty rate for Native Americans is 24.5% percent. In contrast, the

Heavy Equip. & Constr. Co., 986 F.2d 246 (8th Cir. 1993) (ADEA); EEOC v. Cherokee Nation, 871 F.2d 937 (10th Cir. 1989) (ADEA); Donovan v. Navajo Forest Prods. Indus., 692 F.2d 709 (10th Cir. 1982) (OSHA). For decisions applying such statutes to tribes, see, for example, Donovan v. Coeur d’Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985) (OSHA); Smart v. State Farm Ins. Co., 868 F.2d 929 (7th Cir. 1989) (ERISA); Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus., 939 F.2d 683 (9th Cir. 1991) (ERISA); Reich v. Mashantucket Sand & Gravel, 95 F.3d 174 (2nd Cir. 1996) (OSHA).

884. National Labor Relations Act, 29 U.S.C. §§ 151-187 (2004); see San Manuel Indian Bingo and Casino, 341 NLRB No. 138 (2004); Yukon Kuskokwim Health Corp., 341 NLRB No. 139 (May 28, 2004).

885. Fort Apache Timber Co., 226 NLRB 503, 93 LRRM 1296 (1976).

886. San Manuel Indian Bingo and Casino; Yukon Kuskokwim Health Corporation, 341 NLRB No. 139 (2004).

887. Kiowa Tribe of Okla. v. Mfg. Tech., Inc., 523 U.S. 751, 757-58 (1998); see also U.S. DEPARTMENT OF COMMERCE, ECONOMIC DEVELOPMENT ADMINISTRATION, AMERICAN INDIAN RESERVATIONS AND INDIAN TRUST AREAS (Veronica E. Velarde Tiller, ed. 1995); Richard J. Ansson Jr. & Ladine Oravetz, *Tribal Economic Development: What Challenges Lie Ahead for Tribal Nations as They Continue to Strive for Economic Diversity*, 11 KAN. J.L. & PUB. POL’Y 441 (2002).

national poverty rate in the United States between 1999 and 2001 was 11.6%.⁸⁸⁸

XII. INDIAN HERITAGE PRESERVATION

A. *Archaeological Resources Protection Act*

The Archaeological Resources Protection Act (“ARPA”)⁸⁸⁹ states the policy of the United States is to protect archaeological resources and sites that are on public and Indian lands. The Act prohibits unauthorized excavation of such archaeological resources⁸⁹⁰ and authorizes federal land management agencies to grant permits to excavate or remove such resources.⁸⁹¹ A few reported decisions have interpreted the key criminal and civil penalty provisions under ARPA, as well as the application of the Federal Sentencing Guidelines to criminal violations under the Act.⁸⁹²

BIA regulations set forth procedures for obtaining a permit to excavate or remove such resources from lands owned or managed by the BIA.⁸⁹³ Consent of the Indian landowner and the tribe having jurisdiction over the lands, if any, is required.⁸⁹⁴ More extensive DOI regulations implementing ARPA provisions are found in Title 43 of the C.F.R.⁸⁹⁵ These regulations are promulgated jointly by Interior, the Secretaries of Agriculture and Defense, and the Tennessee Valley Authority.⁸⁹⁶ Subpart B contains supplemental DOI regulations including permitting procedures for Indian lands⁸⁹⁷ and civil penalty hearings procedures.⁸⁹⁸

B. *Native American Graves Protection and Repatriation Act*

The Native American Graves Protection and Repatriation Act (“NAGPRA”)⁸⁹⁹ establishes three mechanisms to ensure the protection of Indian cultural property. First, it creates procedures through which culturally affiliated Indian tribes can recover human remains and

888. A QUIET CRISIS, *supra* note 46, at 101.

889. 16 U.S.C. § 470(aa)-(mm) (2004).

890. *Id.* § 470(ee).

891. *Id.* § 470(cc).

892. See Roberto Iraola, *The Archaeological Resources Protection Act - Twenty Five Years Later*, 42 DUQ. L. REV. 221 (2004).

893. 25 C.F.R. pt. 262 (2004).

894. 25 C.F.R. § 262.5(c)(1) (2004).

895. 43 C.F.R. pt. 7 (2003).

896. 43 C.F.R. § 7.2 (2003).

897. *Id.* § 7.35.

898. *Id.* § 7.37.

899. 25 U.S.C. §§ 3001–3013 (2004); 18 U.S.C. § 1170 (2004).

funerary objects from federally funded museums.⁹⁰⁰ Secondly, NAGPRA criminalizes the trafficking of Indian human remains and cultural items.⁹⁰¹ Finally, it sets forth notification and consultation procedures for intentional or inadvertent excavation of Native American human remains and cultural objects on tribal and federal lands.⁹⁰²

Part 10 of 43 C.F.R. contains regulations to carry out provisions of the Act.⁹⁰³ The regulations describe the process for determining the rights of lineal descendants and Indian tribes and Native Hawaiian organizations to certain Native American human remains, funerary objects sacred objects, or objects of cultural patrimony with which they are affiliated.⁹⁰⁴ On April 3, 2003, the BIA published final rules under NAGPRA for assessing civil penalties on museums that fail to comply with applicable provisions of the Act.⁹⁰⁵ Museums that fail to properly repatriate, sell or otherwise transfer human remains, funerary objects, sacred objects or objects of cultural patrimony in violation of NAGPRA, face civil fines including penalties of \$1,000 a day for continuing violations of the Act.⁹⁰⁶

Critics contend that loopholes in NAGPRA leave many Indian burial grounds unprotected. One significant obstacle is that in litigation under NAGPRA there is a threshold requirement of establishing a significant connection between the remains and the plaintiffs. In the recent “Kennewick Man” case the Ninth Circuit held that plaintiff tribes failed to establish any relationship between the ancient remains and presently existing American Indians.⁹⁰⁷ The court reasoned that because the tribe is not federally recognized and the disturbance took place on private lands, the Gabrieleno Indians in Southern California were unable to stop the wholesale removal of hundreds of burials during the construction of a luxury resort.⁹⁰⁸ Nothing in NAGPRA prevents even the placement of strategically located gaming sites atop or adjacent to burial grounds.⁹⁰⁹

900. 25 U.S.C. § 3005 (2004).

901. 18 U.S.C. § 1170 (2004).

902. 25 U.S.C. § 3002(c)-(d) (2004).

903. 43 C.F.R. pt. 10 (2004).

904. *Id.* § 10.1.

905. 68 Fed. Reg. 64,16354 (April 3, 2003) (to be codified at 43 C.F.R. pt. 10).

906. 68 Fed. Reg. 64,16360 (April 3, 2003) (to be codified at 43 C.F.R. § 10.12).

907. *Bonnichsen v. United States*, 357 F.3d 962 (9th Cir. 2004).

908. See Sara Lin, *State Decries Removal of Remains*, L.A. TIMES, March 21, 2004, at B3.

909. See, e.g., *Sac & Fox Nation v. Norton*, 240 F.3d 1250 (10th Cir. 2001), *cert. denied, sub. nom. Wyandotte Nation v. Sac & Fox Nation of Missouri, et al.*, 534 U.S. 1078 (2002) (regarding an attempt by Wyandotte Nation to build casino on or adjacent to burial ground in Kansas City). The Poarch Creek Band of Creek Indians recently built a bingo hall in Alabama on the site of the last territorial capitol of the Muscogee Creek Indians who were removed to Oklahoma in the 1830s. Despite the presence of hundreds of burials, the tribe is now negotiating for the construction of a casino on the site. See, e.g., Garry Mitchell, *Sacred Sites Spark Discussion*, POST & COURIER, May

C. American Indian Religious Freedom Act

The American Indian Religious Freedom Act (“AIRFA”)⁹¹⁰ states that the policy of the United States is to protect and preserve for American Indians their inherent right to believe, express, and exercise their traditional religions, their ability to access ancient religious sites, their use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites. However, AIRFA confers no judicially enforceable private right of action.⁹¹¹ In litigation over a Forest Service road, the Supreme Court held that the government was free to develop its property regardless of interference with religious practices, so long as it did not coerce individuals into violating their religious beliefs or punish religious activity by denying them rights available to others.⁹¹² Against a similar claim, the Ninth Circuit upheld the Forest Service’s approval of a uranium mine near the Grand Canyon.⁹¹³

In a case involving religious use of peyote, the Supreme Court held that if the object of a generally applicable law is not to prohibit or burden religion, its incidental effect upon religion cannot give rise to a free exercise claim.⁹¹⁴ Congress reacted to the decision by enacting the Religious Freedom Restoration Act,⁹¹⁵ which prohibits government from substantially burdening a person’s exercise of religion unless it can show that the burden furthers a compelling governmental interest and is the least restrictive means of doing so. The Supreme Court subsequently held the Act unconstitutional as applied to the states ruling that Congress lacked the power to expand the constitutional right of free expression by statute.⁹¹⁶

15. 2004, available at http://www.charleston.net/stories/051504/wor_15sacred.shtml; see also *Gambling on Hickory Ground*, NATIVE AM. CALLING, Sept. 10, 2002, available at http://nativeamericacalling.org/nac_past20022.shtml.

910. 42 U.S.C. § 1996 (2004).

911. *Lyng v. Northwest Indian Cemetary Protective Ass’n*, 485 U.S. 439, 455 (1988).

912. *Id.*

913. *Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1484-86 (D. Ariz. 1990), *aff’d*, 943 F.2d 32 (9th Cir. 1991), *cert. denied*, 503 U.S. 959 (1992).

914. *Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990).

915. 42 U.S.C. § 2000(bb) (2004).

916. The Supreme Court, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), held that Congress lacked authority to enact such a law through the Enforcement Clause of the Fourteenth Amendment, thus making RFRA inapplicable to actions against the states. After *City of Boerne*, however, the Tenth Circuit held that RFRA created an extra-constitutional statutory claim against the federal government, justified through its Article I, section 8 “necessary and proper” powers. *Kikumura v. Hurley*, 242 F.3d 950, 959 (10th Cir. 2001).

D. Indian Arts and Crafts

The Indian Arts and Crafts Act of 1990⁹¹⁷ prohibits misrepresentation in marketing of Indian arts and crafts products within the United States. The law makes it illegal to offer or display for sale or sell any art or craft product in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization that is resident within the United States. For a first time violation of the Act, an individual can face civil or criminal penalties up to a \$250,000 fine or a five-year prison term or both.⁹¹⁸ If a business violates the Act it can face civil penalties or can be prosecuted and fined up to \$1,000,000.⁹¹⁹ The Act also creates a civil cause of action for misrepresentation of goods as being Indian produced, authorizing injunctive or equitable relief, and punitive damages.⁹²⁰ The action may be instituted by an Indian, Indian tribe, or Indian arts and crafts organization, or by the Attorney General on behalf of such persons.⁹²¹ Any amount recovered is payable to such party.⁹²²

The law established an “Indian Arts and Crafts Board” within the Department of the Interior.⁹²³ The Board is charged with promoting the economic welfare of Indians and Indian tribes through the development of Indian arts and crafts and the expansion of markets for such products.⁹²⁴ The Board may refer complaints of violations of the Act to the Federal Bureau of Investigation and subsequently to recommend to the Attorney General that criminal proceedings be instituted.⁹²⁵ BIA regulations define the nature and Indian origin of products protected under the Act.⁹²⁶

Although there has been relatively little litigation under the Arts and Crafts Act it has been tremendously controversial among many Indians and non-Indians alike. One critic argues that the statute is an ineffective attempt to foster cultural survival because it fails to acknowledge the historical development of both Indian tribes and Indian arts and crafts, and fails to appreciate the ways that contemporary Indian identity is

917. Pub. L. No. 101 Stat. 644 (codified at 18 U.S.C. § 1159 and 25 U.S.C. § 305).

918. 18 U.S.C. § 1159(b)(1) (2004).

919. *Id.*

920. 25 U.S.C. § 305e (2004).

921. § 305e(c)(1).

922. § 305e(c)(2).

923. § 305.

924. § 305a.

925. § 305d.

926. 25 C.F.R. pt. 309 (2004).

constructed.⁹²⁷

XIII. HUMAN AND HEALTH SERVICES

A. Social Services

Congress has tasked BIA with responsibility “for the benefit, care, and assistance of the Indians throughout the United States.”⁹²⁸ The Snyder Act of 1921 authorizes the BIA to “direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States” for purposes including “[g]eneral support and civilization,” “relief of distress and conservation of health[,]” and assistance with property, employment, and “administration of Indian affairs.”⁹²⁹ Although phrased in terms of expending “such moneys as Congress may from time to time appropriate,” the statute broadly delegates responsibility for matters including general assistance, education, health, economic development, administration of Indian property, public facilities, law enforcement, and transportation.⁹³⁰ The statute is liberally construed for the benefit of Indians.⁹³¹

In recent years, Congress has curbed the use of appropriated funds for general assistance where equivalent state programs are available,⁹³² where benefit levels are in excess of state levels⁹³³ or where tribes have restricted eligibility or benefit levels in order to use savings for other tribal priorities.⁹³⁴ BIA regulations govern the provision to eligible Indians of financial assistance and social services including adult care assistance, burial assistance, child assistance, disaster assistance, emergency assistance, general assistance, services to children, elderly and families, and work experience.⁹³⁵ Such programs are secondary to other sources of Federal, state or local assistance, and are subject to

927. See William J. Hapiuk, Jr., *Note: Of Kitsch and Kachinas: A Critical Analysis of the Indian Arts and Crafts Act of 1990*, 53 STAN. L. REV. 1009 (2001). Hapiuk recommends the criminal and civil provisions of the IACA be repealed and replaced by a certification trademark program.

928. Act of November 2, 1921, Pub. L. No. 115, 42 Stat. 208 (codified as amended at 25 U.S.C. § 13 (2004)).

929. 25 U.S.C. § 13 (2004).

930. *Id.*

931. *Morton v. Ruiz*, 415 U.S. 199 (1974).

932. 25 U.S.C. § 13(d) (2004).

933. § 13(d)(1).

934. § 13(d)(3). The author has argued elsewhere that it is unfair to take from the poorest of the poor under the guise of savings to subsidize other priorities. *Tribal Welfare Reform: The Miner's Canary*, 32 CLEARINGHOUSE REV. 554 (Apr. 1998).

935. 25 C.F.R. pt. 20 (2004).

annual Congressional appropriations.⁹³⁶ Tribes operating assistance programs under BIA contracts may establish different eligibility criteria or benefit levels.⁹³⁷ A tribe may use savings from a redesign of its program to fund other tribal priorities.⁹³⁸ BIA decisions to decrease or terminate financial assistance may be appealed pursuant to 25 C.F.R. § 2 (2005).⁹³⁹ An applicant or recipient may appeal decisions from tribally administered programs only through the process set forth in the relevant BIA contract or if none exists, “through the appropriate tribal forum.”⁹⁴⁰

President Clinton’s “welfare reform” made sweeping changes to the nation’s welfare system substituting a program called Temporary Assistance for Needy Families (“TANF”) in place of the old Aid to Families with Dependent Children (“AFDC”) program.⁹⁴¹ TANF was intended “to increase the flexibility of States” in operating welfare programs by shifting administration of welfare benefits almost entirely from the federal government to the states.⁹⁴² TANF ensures that the state will provide aid to tribal members who are not part of a tribal assistance program. For a state to be eligible for TANF funds the state must certify that it “will provide each member of an Indian tribe, who is domiciled in the State and is not eligible for assistance under a tribal family assistance plan . . . with equitable access to assistance under the State program funded under this part attributable to funds provided by the Federal Government.”⁹⁴³

In addition, TANF authorizes Indian tribes to apply for welfare funds.⁹⁴⁴ TANF’s provision for “direct funding and administration by Indian tribes” directs the Secretary of Health and Human Services (“HHS”) to “pay to each Indian tribe that has an approved tribal family assistance plan a tribal family assistance grant for the fiscal year.”⁹⁴⁵ TANF mandates that “each Indian tribe to which a grant is made . . . shall use the grant for the purpose of operating a program to make work activities available to such population and such service area or areas as the tribe specifies.”⁹⁴⁶ Finally, TANF gives Indian tribes somewhat more flexibility than states in applying for block grants. The Secretary of

936. 25 C.F.R. § 20.102.

937. § 20.202.

938. § 20.207.

939. § 20.700-705.

940. § 20.705.

941. Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), 104 Pub. L. No 193, 110 Stat. 2105 (codified at 42 U.S.C. § 601).

942. 42 U.S.C. § 601(a) (2004).

943. § 602(a)(5).

944. § 612.

945. § 612(a)(1)(A).

946. § 612(a)(2)(C).

Labor, for instance, is permitted to waive or modify a set of limitations normally imposed on states,⁹⁴⁷ “to the extent necessary to enable the Indian tribe to operate a more efficient or effective program.”⁹⁴⁸ TANF is not a contractible program under the self-determination provisions of the ISDEAA.⁹⁴⁹

The Indian Child Welfare Act of 1978⁹⁵⁰ tasks the BIA with helping to notify tribes and Indian families of foster care and adoption proceedings, providing assistance, and maintaining records on Indian child adoptions.⁹⁵¹ The BIA is also responsible for making grants to tribal governments for establishment and operation of child and family services programs⁹⁵² as well as similar grants to off-reservation Indian organizations.⁹⁵³ The BIA also operates programs to assist Indians to obtain permanent employment⁹⁵⁴ and vocational training programs.⁹⁵⁵ Congress has authorized tribes to consolidate such BIA assistance together with employment and training assistance provided by other federal agencies in order to create a single comprehensive program under tribal administration and control.⁹⁵⁶

B. Health Care

Although the Snyder Act provided basic authorization for Indian health care⁹⁵⁷ the BIA was ill equipped to carry out the mandate. Responsibility for Indian health care was transferred in 1955 from the BIA to the Public Health Service (“PHS”), which at the time was a

947. *See id.* § 603(a)(5)(C).

948. *Id.* § 612(a)(3)(C)(ii).

949. *Navajo Nation v. Dep’t of Health & Human Serv’s.*, 325 F.3d 1133 (9th Cir. 2003).

950. Pub. L. No. 95-608, 92 Stat. 3069 (codified as amended at 25 U.S.C. § 1901). The Act seeks to protect the best interests of Indian children by establishing federal standards to minimize the removal of Indian children from their families in state court proceedings. The author has written elsewhere to argue that state courts have largely ignored the federal law, and that the BIA has not fulfilled its responsibilities to pursue state compliance with the Act. *The Indian Child Welfare Act: In the Best Interests of the Child and Tribe*, 27/8 CLEARINGHOUSE REV. 864 (Dec. 1993). The National Indian Child Welfare Association (NICWA represents tribal governments and urban Indian social service programs, working on behalf of Indian children and families). *See* www.nicwa.org.

951. *E.g.*, 25 U.S.C. § 1951 (2004); *see also* 25 C.F.R. § 23.11(b) (BIA receipt of notice); § 23.11(f) (BIA to provide notice); § 23.11(g)(help identify family or tribe); § 23.13 (payment for appointed counsel); § 23.81 (assistance in identifying witnesses); § 23.82 (assistance in identifying language interpreters); § 23.81 (assistance in identifying biological parents after termination of adoption) (2004).

952. 25 C.F.R. § 23.21-23.23 (2004).

953. § 23.31-23.35. Grant applicants may appeal decisions of the BIA under 25 C.F.R., § 2 (2004). § 23.61-23.63.

954. *Id.* pt. 26.

955. *Id.* pt. 27.

956. Pub. L. No. 102-477, 106 Stat. 2302 (codified as amended at 25 U.S.C. § 3401).

957. Ch. 115, 42 Stat. 208 (codified as amended at 25 U.S.C. § 13 (2004)).

division of the Department of Health, Education, and Welfare (“HEW”) and is now part of the Department of Health and Human Services (“HHS”). The Indian Health Service (“IHS”) within the PHS is directly responsible for Indian health care.⁹⁵⁸

Congress reaffirmed Federal responsibility for Indian health care with the passage of the Indian Health Care Improvement Act (“IHCIA”) of 1976⁹⁵⁹ and its 1992 amendments.⁹⁶⁰ The IHCIA permits the Secretary of the Interior “to expend funds . . . for the purposes of eliminating the deficiencies in health status and resources of all Indian tribes.”⁹⁶¹ Specifically, it authorizes the Secretary’s expenditure of funds for, among other things, “meeting the health needs of Indians” and “augmenting the ability of the [Indian Health] Service to meet . . . health service responsibilities . . . with respect to those Indian tribes with the highest levels of health status and resource deficiencies.”⁹⁶² Unlike TANF, the IHCIA is notable for “Congress’ recognition of federal responsibility for Indian health care.”⁹⁶³ Tribal advocates have taken a strong and persistent role in helping to fashion federal Indian health policy. A leading voice for tribes is the National Indian Health Board (“NIHB”), a non-profit organization established in 1972, that represents Tribal Governments operating their own health care delivery systems through contracting and compacting, as well as those receiving health care directly from the Indian Health Service (“IHS”).⁹⁶⁴

The IHS is the primary source of medical care for most American Indians and Alaska Natives. Care is provided through a network of forty-nine hospitals and over five hundred outpatient clinics and smaller facilities located primarily in the Southwest, Oklahoma, the Northern Plains, and Alaska. The IHS also purchases medical care for Indian people from non-IHS hospitals and health providers and funds thirty-four urban Indian health organizations. In addition to providing medical treatment, the IHS carries out substantial prevention and wellness activities including diabetes prevention and disease management, sanitation construction to provide water and waste disposal for Indian communities, injury prevention, mental health services, and

958. See Rose L. Pfefferbaum et al., *Providing for the Health Care Needs of Native Americans: Policy, Programs, Procedures, and Practices*, 21 AM. INDIAN L. REV. 211, 215 (1997); see also, *Report on Indian Health: Task Force Six* 33 AM. INDIAN POL’Y REV. COMM’N (1976); Betty Pfefferbaum et al., *Learning How To Heal: An Analysis of the History, Policy, and Framework of Indian Health Care*, 20 AM. INDIAN L. REV. 365, 381 (1995-96).

959. Pub. L. No. 94-437, 90 Stat. 1400.

960. Indian Health Care Improvement Act of 1992, Pub. L. No. 102-573, 106 Stat. 4526.

961. 25 U.S.C. § 1621(a)(1) (2004).

962. *Id.* § 1621(a)(3)-(4).

963. *McNabb v. Bowen*, 829 F.2d 787, 792 (9th Cir. 1987) (emphasis added).

964. See <http://www.nihb.org>.

alcohol/substance abuse treatment and prevention.⁹⁶⁵

The House of Representatives approved a FY 2005 IHS budget of \$3 billion that was \$66 million above the White House request.⁹⁶⁶ After a delay of two years, apparently due to concerns over potential costs, the Administration recently lent its support to reauthorization of the Indian Health Care Improvement Act.⁹⁶⁷

The IHS has not completely escaped the type of criticism otherwise reserved for the BIA. At a 1989 Hearing on “Mismanagement of Indian Health Service,” the Indian Affairs Committee even compared the agency unfavorably to the BIA.⁹⁶⁸ Yet, despite the Committee’s characterization of the IHS, Congress’ own Office of Technology Assessment (“OTA”) recognized with diplomatic understatement, that there was plenty of blame to go around. “Given the scarce resources available to IHS to achieve its mission,” a researcher testified, “OTA cannot conclude that the inadequacies in the IHS system can be held entirely responsible for the continuing poor health of Indian [sic].”⁹⁶⁹

C. Administration for Native Americans

Another HHS agency that plays a leading role in programs designed specifically for tribes and individual Indians is the Administration for Native Americans (“ANA”). ANA was created in 1974 to promote the goal of self-sufficiency for Native Americans by providing social and economic development opportunities through financial assistance, training, and technical assistance to eligible Tribes and Native American organizations. To achieve this mission, ANA provides funding through discretionary grants to eligible Tribes and Native organizations on a competitive basis. In Fiscal Year 2003, Congress appropriated \$45.5 million for Social and Economic Development Strategies (SEDS) Projects, Environmental Regulatory Enhancement Projects, and Native Language Preservation and Maintenance Projects.⁹⁷⁰

Examples of the range of projects which help to promote the economic and social development of Native Americans are: creation of

965. <http://www.hhs.gov/budget/docbudget.htm>.

966. H.R. REP. NO.108-542, Department of the Interior and Related Agencies Appropriation Bill (2005).

967. *Hearing on Pending Legislation to Reauthorize the Indian Health Care Improvement Act Before the Senate Comm. on Indian Affairs*, 108th Cong. - 2nd Sess., (July 21, 2004) (testimony of Tommy G. Thompson, Secretary of Health and Human Services, U.S. Department of Health and Human Services), available at <http://www.indian.senate.gov/2004hrsgs>.

968. *Mismanagement of Indian Health Service: S. Hrg. 101-126 Before the Senate Select Comm. on Indian Affairs*, 101st Cong. 1st Sess., pt. 8 (1989).

969. *Id.*, S. Hrg. 101-126, pt. 8, at 1-18, (Testimony of Denise Dougherty).

970. See <http://www.acf.hhs.gov/programs/ana>.

new jobs and development or expansion of business enterprises and social service initiatives; establishment of new Tribal employment offices; formulation of environmental ordinances and training in the use and control of natural resources; enactment of new codes and management improvements to strengthen the governmental functions of Tribes and Native American organizations; and establishment of local court systems. The Commissioner of the ANA is the Chair of the Intra-Departmental Council on Native American Affairs (“ICNAA”) within HHS and advises the Secretary on Native American issues.⁹⁷¹

D. “A Quiet Crisis”⁹⁷²

Despite the array of social programs administered by the BIA and HHS, the U.S. Commission on Civil Rights notes that “nearly a quarter of Native Americans—more than twice the national average—continue to live in poverty.”⁹⁷³ Native Americans are more than twice as likely as the general population to face “hunger and food insecurity” at any given time.⁹⁷⁴

Native Americans have a lower life expectancy—nearly six years less—and higher disease occurrence than other racial/ethnic groups. Roughly 13% of Native American deaths occur among those under the age of twenty-five, a rate three times more than that of the total U.S. population. Native American youth are more than twice as likely to commit suicide, and nearly 70% of all suicidal acts in Indian Country involve alcohol. Native Americans are 670% more likely to die from alcoholism, 650% more likely to die from tuberculosis, 318% more likely to die from diabetes, and 204% more likely to suffer accidental death when compared with other groups.⁹⁷⁵

The U.S. Commission on Civil Rights has criticized the inadequacy of not only BIA and HHS programs, but also USDA’s Food Distribution Program on Indian Reservations (“FDPIR”) that “lost funding when accounting for inflation between 1999 and 2003, reducing available food

971. *Id.*

972. A QUIET CRISIS, *supra* note 46. Noting the relative small size and geographic isolation of tribal communities and the growing gap between needs and federal resources the U.S. Civil Rights Commission terms Indians the “invisible minority” and warns of a “quiet crisis.” *Id.* at 40.

973. A QUIET CRISIS, *supra* note 46, at 8.

974. A QUIET CRISIS, *supra* note 46, at 107. “From 1995 to 1997, 22.2 percent of Native American households were food insecure, meaning they did not have enough food to meet even their basic needs.” A QUIET CRISIS, *supra* note 46, at 107.

975. A QUIET CRISIS, *supra* note 46, at 34-35.

resources.”⁹⁷⁶ The Commission noted that the Administration’s 2004 budget proposed to reduce funding by more than 18.2% from 2003.⁹⁷⁷

The Commission on Civil Rights notes that most Native Americans do not have private health insurance and thus rely exclusively on the IHS for health care.⁹⁷⁸ Yet, according to the Commission’s calculations, the IHS operates with only 59% of the amount necessary to stem the crisis in Indian health.⁹⁷⁹ The Commission found that:

[H]ealth facilities are frequently inaccessible and medically obsolete and preventive care and specialty services are not readily available . . . The federal government spends less per capita on Native American health care than on any other group for which it has this responsibility including Medicaid recipients, prisoners, veterans, and military personnel. Annually, IHS spends 60% less on its beneficiaries than the average per person health care expenditure nationwide.

. . . .

The IHS, although the largest source of federal spending for Native Americans, constitutes only 0.5% of the entire HHS budget.⁹⁸⁰

The staff of the Civil Rights Commission has followed up the “Quiet Crisis” report by releasing a more detailed draft report on Indian health problems and lack of adequate health care.⁹⁸¹ “Broken Promises: Evaluating the Native American Health Care System” notes that

Native Americans are 770 percent more likely to die from alcoholism, 650 percent more likely to die from tuberculosis, 420 percent more likely to die from diabetes, 280 percent more likely to die from accidents, and 52 percent more likely to die from pneumonia or influenza than the rest of the United States, including white and minority populations.⁹⁸²

While criticizing Congress for failing to adequately fund Indian health programs, the report also urges IHS to eliminate social, cultural and “structural” barriers that may affect delivery of health care. These include cultural training; partnerships with tribes; improved investigation

976. A QUIET CRISIS, *supra* note 46, at 12.

977. A QUIET CRISIS, *supra* note 46, at 106.

978. A QUIET CRISIS, *supra* note 46, at 35.

979. A QUIET CRISIS, *supra* note 46, at 43.

980. A QUIET CRISIS, *supra* note 46, at 12-13.

981. Broken Promises: Evaluating the Native American Health Care System (July 2004) at <http://www.usccr.gov/pubs/nahealth/nabroken.pdf>.

982. A QUIET CRISIS, *supra* note 46, at 8.

and handling of bias and discrimination complaints; fully funding tribal contract support costs; and changing the contract health services (“CHS”) system to allow all Native Americans, regardless of location, to receive services.⁹⁸³

XIV. HOUSING

A. BIA’s Housing Improvement Program

The federal government’s recognition of its responsibility to provide adequate Indian housing stretches back for two centuries,⁹⁸⁴ although the promise remains largely unkept.⁹⁸⁵ Today, the BIA plays a secondary role in Indian housing to that of HUD. Indeed, BIA’s “Housing Improvement Program” (“HIP”) offers assistance to only “the neediest of the needy Indian families who have no other resource for standard housing.”⁹⁸⁶ HIP provides grants for the cost of services to repair, renovate, replace, or provide housing. Tribal administration of the HIP program is “encouraged to the maximum extent possible.”⁹⁸⁷ The BIA may approve the mortgage of a landowner’s interest in individual allotment lands⁹⁸⁸ and leasehold interests in individual or tribal trust property.⁹⁸⁹

B. HUD & NAHASDA

Like BIA, HUD gives tribal governments a large say in its Indian housing programs, having radically deregulated tribal housing in the 1990s eliminating several separate programs of assistance and replacing them with a single block grant program, the Native American Housing Assistance and Self-Determination Act of 1996⁹⁹⁰ (“NAHASDA”).⁹⁹¹

NAHASDA is administered through HUD’s Office of Native American Programs (“ONAP”).⁹⁹² Tribes design their own housing plans

983. A QUIET CRISIS, *supra* note 46, at 136-39.

984. See Virginia Davis, *A Discovery of Sorts: Reexamining the Origins of the Federal Indian Housing Obligation*, 18 HARV. BLACKLETTER L.J. 211 (Spring 2002).

985. A QUIET CRISIS, *supra* note 46, at 50-63.

986. 25 C.F.R. § 256.3(a) (2004).

987. § 256.3(c), 256.12.

988. 25 U.S.C. § 483(a) (2004).

989. 25 C.F.R. § 162.610 (2004).

990. Pub. L. No. 104-330, 110 Stat. 4016 (codified at 25 U.S.C. 4101-4195).

991. Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), Pub. L. No. 104-330, 110 Stat. 4016 (codified at 25 U.S.C. §§ 4101-4212); *see generally*, Susan J. Ferrell, *Indian Housing: The Fourth Decade*, 7 ST. THOMAS L. REV. 445 (1995).

992. 25 U.S.C. § 4102 (2004). ONAP hosts a federal inter-agency Native American Web site,

and submit them to ONAP, which makes block grants directly to tribes.⁹⁹³ Eligible activities include buying, building, or improving homes as well as funding services like counseling and crime prevention.⁹⁹⁴ The Act allows grant recipients to apply for loan guarantees backed by the full faith and credit of the United States.⁹⁹⁵ Leasehold terms are permitted for up to fifty years to encourage private lending.⁹⁹⁶

C. Promises Unkept

The U.S. Civil Rights Commission reports that there is a significant need for safe and sanitary housing in Indian country.

Roughly 90,000 Indian families are homeless or under-housed; more than 30% of reservation households are crowded and 18% are severely crowded. Roughly 16% of Native American homes are without telephones, while only 6% of non-Native households lack telephone service . . . Fewer than 50% of homes on reservations are connected to a public sewer system.⁹⁹⁷

Funding for Native American programs at HUD, according to the Commission, increased only slightly over the past four years (8.8%), significantly less than the agency as a whole (62%).⁹⁹⁸ The Commission notes that the “tribal housing loan guarantee program lost nearly 70% of its purchasing power over the last four years”⁹⁹⁹ As in other areas of importance to tribes, they have banded together to make their collective voice heard on housing policy issues. The National American Indian Housing Council (“NAIHC”) is a leading advocacy organization that provides technical assistance and advocacy for tribal housing programs.¹⁰⁰⁰

known as “Code Talk,” that is designed specifically to deliver electronic information from government agencies and other organizations to Native American communities. See <http://www.codetalk.fed.us>.

993. 25 U.S.C. § 4111 (2004).

994. *Id.* § 4132(1)-(6).

995. 25 U.S.C. §§ 4191, 4192 (2004).

996. *Id.* § 4211.

997. A QUIET CRISIS, *supra* note 46, at 50.

998. A QUIET CRISIS, *supra* note 46, at 54-55.

999. A QUIET CRISIS, *supra* note 46, at 60.

1000. See <http://www.naihc.net>.

IX. EDUCATION

A. "A National Tragedy"¹⁰⁰¹

In 1819, Congress authorized the President to institute education programs for Indians, including instruction in agriculture as well as reading, writing, and arithmetic.¹⁰⁰² Vacant military posts and barracks were converted for use as schools.¹⁰⁰³ Churches were given control of Indians' treaty rations¹⁰⁰⁴ and granted land patents for purposes of operating mission schools,¹⁰⁰⁵ a practice not formally ended until 1968.¹⁰⁰⁶ Early Indian education policies sought to assimilate Indian children and to essentially terminate their Indian culture.¹⁰⁰⁷

Federal policy began a gradual shift after the 1928 Meriam Report focused national attention on the grossly inadequate state of federal Indian policies, including education.¹⁰⁰⁸ In 1934, through the Johnson-O'Malley Act, Congress provided for contracts and grants to integrate Indian education into state school systems.¹⁰⁰⁹ In 1950, Congress adopted legislation popularly known as "Impact Aid," authorizing federal subsidies to state operated public schools for the education of children "connected" with federal lands exempt from taxation, including Indian reservations.¹⁰¹⁰ The Elementary and Secondary Education Act of 1965 established funds for Indian students.¹⁰¹¹ Still, at the end of the sixties in

1001. See Senate Special Subcommittee on Indian Educ., Comm. on Labor & Pub. Welfare, *Indian Education: A National Tragedy - A National Challenge*, S. REP. NO. 91-501 at 21 (1969) [hereinafter, *A National Tragedy*].

1002. Act of March 3, 1819, Pub. L. No. c. 85, 3 Stat. 516 (codified at 25 U.S.C. § 271).

1003. Act of July 31, 1882, Pub. L. No. c. 363, 22 Stat. 181 (codified at 25 U.S.C. § 276).

1004. Act of June 21, 1906, Pub. L. No. c. 3504, 34 Stat. 326 (codified at 25 U.S.C. § 279).

1005. Act of September 21, 1922, Pub. L. No. c. 367, § 3, 42 Stat. 995 (codified at 25 U.S.C. § 280).

1006. Pub. L. No. 90-280, § 2, 82 Stat. 71 (codified at 25 U.S.C. § 278a).

1007. See, e.g., Allison M. Dussias, *Let No Native American Child Be Left Behind: Re-Envisioning Native American Education for the Twenty-First Century*, 43 ARIZ. L. REV. 819, 829-32 (2001); Raymond Cross, *American Indian Education: The Terror of History and the Nation's Debt to the Indian Peoples*, 21 U. ARK. LITTLE ROCK L. REV. 941, 944 (1999).

1008. MERIAM REPORT, *supra* note 7.

1009. Act of April 16, 1934, Pub. L. No. 73-167, 48 Stat. 596 (codified as amended at 25 U.S.C. §§ 452-457). The Act authorizes the Secretary of the Interior "to enter into a contract . . . with any State . . . for the education, medical attention, agricultural assistance, and social welfare, including relief of distress, of Indians in such State." The federal regulations specify that "education contracts under the Johnson-O'Malley Act . . . shall be for the purpose of financially assisting those efforts designed to meet the specialized and unique educational needs of eligible Indian students." 25 C.F.R. § 273.1(a) (2004).

1010. Pub. L. 81-874, c. 1124, 64 Stat. 1100 (1950), codified as amended at 20 U.S.C. §§ 7701-7714. School districts receiving Impact Aid funds for children residing on Indian lands must adopt certain "Indian policies and procedures" to ensure equal participation of Indian children in all aspects of the instructional program of the district. 20 USC § 7704.

1011. 20 U.S.C. §§ 2701-2713 (2004).

a Senate report subtitled “A National Tragedy – A National Challenge,” Indian education was said to be characterized by a “dismal record of absenteeism, dropouts, negative self-image, low achievement, and, ultimately, academic failure for many Indian children.”¹⁰¹²

B. The Self-Determination Era

A renewed focus on improving Indian education resulted in a series of new laws, including the Indian Education Assistance Act of 1975¹⁰¹³ (authorizing contracts with states for school construction on Indian lands); the Indian Self-Determination and Education Assistance Act of 1975¹⁰¹⁴ (permitting tribes to operate federally funded educational programs); the Tribally Controlled Schools Act of 1988¹⁰¹⁵ (directing BIA to make grants to tribes operating BIA-funded schools); Part B of Title XI of the Education Amendments of 1978;¹⁰¹⁶ the National Fund for Excellence in American Indian Education (directs BIA to make grants to tribes to permit the tribes to provide financial assistance to individual Indian students for the costs of attendance at institutions of higher education);¹⁰¹⁷ and the American Indian Education Foundation¹⁰¹⁸ (a federally chartered corporation intended to further educational opportunities for American Indians).

The primary legislation that authorizes federal spending on education, the Elementary and Secondary Education Act (“ESEA”) was reauthorized in January of 2002, now known as the “No Child Left Behind” Act (“NCLB”) of 2001.¹⁰¹⁹ NCLB requires states to set twelve-year goals to ensure that all students meet state academic standards and to close achievement gaps between rich and poor and minority and non-minority students. In addition, the NCLB specifically addresses programs for Indian, Native Hawaiian, and Alaska Native Education, in amendments known as the Native American Education Improvement Act of 2001¹⁰²⁰ that states:

1012. *A National Tragedy*, *supra* note 1001.

1013. Pub. L. No. 93-638, 88 Stat. 2214 (codified as amended at 25 U.S.C. § 458-458(e)).

1014. 25 U.S.C. § 450(a), (f) (2004).

1015. *Id.* §§ 2501-2511.

1016. Pub. L. No. 95-561, 92 Stat. 2136 (as amended by Pub. L. No. 103-382, Title II, § 381, 108 Stat. 3979 (1994)).

1017. 25 U.S.C. § 3301. Originally called the American Indian Education Foundation, it has been redesignated as the National Fund for Excellence in American Indian Education. See 108 Pub. L. No. 267, 118 Stat. 797 (Jul. 2, 2004).

1018. Pub. L. No. 106-568, 114 Stat. 2936 (codified at 25 U.S.C. § 458(bbb)).

1019. Pub. L. No. 107-110, 115 Stat. 2007 (20 U.S.C. § 6301).

1020. 25 U.S.C. § 2001 (2004).

It is the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children and for the operation and financial support of the Bureau of Indian Affairs-funded school system to work in full cooperation with tribes toward the goal of ensuring that the programs of the Bureau of Indian Affairs-funded school system are of the highest quality and provide for the basic elementary and secondary educational needs of Indian children, including meeting the unique educational and cultural needs of those children.¹⁰²¹

Although Congress coupled the new reforms in ESEA with historic increases in funding and targeting schools with high percentages of low-income children, Indian leaders charge that the President's FY05 Budget under-funds ESEA by \$9.4 billion below the authorized level.¹⁰²²

On April 30, 2004, President Bush signed Executive Order 13336 on American Indian and Alaska Native Education, declaring support for tribal sovereignty, tribal traditions, languages and cultures; establishing an interagency working group to develop a federal interagency plan that recommends initiatives, strategies and ideas for actions to promote the purposes of the Executive Order; calling for a multi-year study of American Indian and Alaska Native education with the purpose of improving Native students' ability to meet the standards of the No Child Left Behind Act; calling for a report to the President; and seeking enhancement of research capabilities of tribal-level educational institutions. The Task Force is to convene a forum on the No Child Left Behind Act to identify means to enhance communication, collaboration, and cooperative strategies to improve the education of Native students attending federal, state, Tribal and other schools.¹⁰²³

C. BIA's Office of Indian Education

The Office of Indian Education Programs ("OIEP") within the BIA

1021. *Id.* § 2000. BIA has promulgated a proposed rule for grants to tribal schools that was negotiated in the wake of the No Child Left Behind Act. *See* 69 F.R. 8752, 8788-8789 (Feb. 25, 2004).

1022. *The No Child Left Behind Act: Hearing Before the Senate Comm. on Indian Affairs*, 108th Cong. – 2d Sess., *Hearing* (June 16, 2004) (testimony of Cindy La Marr, President, National Indian Education Association).

1023. The Executive Order was signed at the persistent urging of the National Indian Education Association (NIEA). Founded in 1969, the NIEA is the largest organization in the nation dedicated to Indian education advocacy issues and embraces a membership of over 4,000 American Indian, Alaska Native and Native Hawaiian educators, tribal leaders, school administrators, teachers, parents and students. *See* <http://www.niea.org>.

is charged with the responsibility for administering BIA's education programs.¹⁰²⁴ There are approximately 541,000 elementary and secondary-aged Indian students in the United States, about 49,000 of whom are enrolled in 185 federal Indian schools, 64 of which are operated by the BIA, with the remainder operated by Indian tribes.¹⁰²⁵ The BIA school system includes elementary, secondary, and boarding schools located on 63 reservations in 23 states. BIA also provides for the education of about 30,000 adult Indian students at 25 BIA-funded Tribally controlled community colleges and universities and an additional 1,600 Indian adults at two colleges operated by BIA.¹⁰²⁶

The majority of funding for the OIEP is provided through the Department of the Interior's annual appropriation. The OIEP receives additional funding from the U.S. Department of Education and other sources.¹⁰²⁷ The OIEP distributes the majority of appropriated funds to schools under the Indian School Equalization Program ("ISEP") that provides direct funding for the instruction and residential care of Indian children. For budget fiscal year 2001/2002, the OIEP spent approximately \$728 million in funding received from all sources. Of the \$728 million, \$667 million was used by schools and education field offices and about \$61 million was used by the OIEP Central Office.¹⁰²⁸

Current OIEP policy is "to facilitate Indian control of Indian affairs in all matters relating to education."¹⁰²⁹ Eligibility for BIA education programs is limited to students who are tribal members or at least one-quarter Indian blood descendant of a tribal member and who reside on or near an Indian reservation or meet criteria for attendance at BIA off-reservation boarding schools.¹⁰³⁰ Eligibility may be extended to certain other students, for example, dependents of BIA employees.¹⁰³¹

1024. 25 C.F.R. pt. 33 (2004).

1025. U.S. Gen. Accounting Office, *BIA and DOD Schools: Student Achievement and Other Characteristics Often Differ from Public Schools*, at 3 (2001) [hereinafter GAO REP., *BIA Schools*].

1026. U.S. Department of the Interior, Office of Inspector General, Bureau of Indian Affairs Office of Indian Education Programs Central Office Management of Administrative Funds, REP. NO. C-In-Bia-0007-2003 (March 2004), Appendix 1 at 12-13. Haskell Indian Nations University was established in Lawrence, Kansas, in 1884 as the United States Indian Industrial Training School. See <http://www.haskell.edu>. The Southwestern Indian Polytechnic Institute is a National Indian Community College and Land Grant Institute established in Albuquerque in 1971. See <http://www.sipi.bia.edu>.

1027. Funding is provided by DOE under the Elementary and Secondary Education Act (as amended by the No Child Left Behind Act of 2001) and the Individuals with Disabilities Education Act.

1028. See generally, U.S. Department of the Interior, Office of Inspector General, Bureau of Indian Affairs Office of Indian Education Programs Central Office Management of Administrative Funds, REP. NO. C-In-Bia-0007-2003 (March 2004).

1029. 25 U.S.C. § 2011(a) (2004).

1030. § 2007(f).

1031. *Id.*

The OIEP has established minimum academic standards for the basic education of Indian children and national criteria for dormitory housing.¹⁰³² There are stringent standards for employment of education personnel.¹⁰³³ The Indian School Equalization program has rules to ensure uniform direct funding of BIA and tribally operated schools.¹⁰³⁴ Other regulations govern educational loans and grants,¹⁰³⁵ grants to tribally controlled community colleges,¹⁰³⁶ maintenance of student records in BIA schools,¹⁰³⁷ and adult education.¹⁰³⁸

Because OIEP employees are in contact with Indian children they are subject to statutes that require federal agencies involved with the provision of services to children under age eighteen to assure that all existing and newly hired employees undergo a criminal background check.¹⁰³⁹ In addition, OIEP is also subject to the Indian Child Protection and Family Violence Protection Act of 1990¹⁰⁴⁰ that requires background investigations of individuals who are employed or being considered for employment in a position that has regular contact with or control over Indian children. Individuals are not eligible for appointment if they have been found guilty of, or entered a plea of no contest or guilty to, any felony offense or any two or more misdemeanor offenses under federal, state, or Tribal law involving crimes of violence; sexual assault, molestation, exploitation, contact, or prostitution; crimes against persons; or offenses committed against children.

Pursuant to the Act, the BIA has established minimum standards of character and suitability for employment not just for school employees but for all individuals whose duties and responsibilities allow them regular contact with or control over Indian children,¹⁰⁴¹ and to establish the method for distributing funds to support tribally operated programs to protect Indian children and reduce the incidence of family violence in Indian country.¹⁰⁴² Tribal employers are required to conduct background investigations of all prospective employees whose responsibilities allow them regular contact with or control over Indian children and to employ

1032. 25 C.F.R. pt. 36 (2004).

1033. pt. 38.

1034. pt. 39.

1035. pt. 40.

1036. pt. 41.

1037. pt. 42.

1038. pt. 46.

1039. Crime Control Act of 1990, Subchapter V-Child Care Worker Employee Background Checks, Pub. L. No. 101-647, Title II, Subtitle E, § 231, 104 Stat. 4808 (codified in 42 U.S.C. § 10341).

1040. Pub. L. No. 101-630, 104 Stat. 4544 (codified at 25 U.S.C. §§ 3201-3211).

1041. 25 C.F.R. § 63.10-63.24 (2004).

1042. *Id.* § 63.30-63.36.

only those individuals who meet standards of character no less stringent than those established for BIA employees.¹⁰⁴³

D. Failing Grades

The importance of education to tribes cannot be overstated, as evidenced by the activities of the NIEA and other advocacy organizations. The American Indian Higher Education Consortium (“AIHEC”), for example, was founded in 1972 by six tribal colleges and has grown to represent thirty-four colleges in the United States and one Canadian institution.¹⁰⁴⁴ Another prominent organization, the American Indian Science & Engineering Society (“AISES”), promotes educational opportunities for Native students in science, engineering, and technology.¹⁰⁴⁵

Groups such as these have made great strides in helping to improve Indian education, but for some, the changes are too little, too late. Former students at church-run schools in South Dakota recently filed a \$25 billion class-action lawsuit against the federal government alleging that federally-funded church schools were little more than “labor camps” rife with “round-the-clock” physical and sexual abuse that continued into the 1970s.¹⁰⁴⁶

Decades later, Indian education provided by the BIA continues to be markedly inferior to public school education. A 2001 report of the General Accounting Office (“GAO”) on BIA schools found that students’ academic achievement and performance on college admission exams and statewide assessment tests were “far below the performance” of public school students.¹⁰⁴⁷ The GAO report found that one in five BIA students was enrolled in a special education program and that nearly 60% had limited English proficiency.¹⁰⁴⁸ Recruiting and retention of qualified staff remained an issue as did a nearly \$1 billion backlog of repairs and construction.¹⁰⁴⁹ The GAO report also emphasized the negative impact of social problems, including poverty, unemployment, and substance abuse on the academic achievement of Indian students.¹⁰⁵⁰

In the last decade, one in three Native American students failed to

1043. *Id.* § 63.13(b).

1044. See <http://www.aihec.org>.

1045. See <http://www.aises.org>.

1046. See Sharon Waxman, *Abuse Charges Hit Reservation, Church-Run Schools Cited In Wide-Ranging Lawsuit*, WASHINGTON POST, June 2, 2003, at A01.

1047. GAO REP, BIA Schools, *supra* note 1025, at 2.

1048. GAO REP, BIA Schools, *supra* note 1025, at 33.

1049. GAO REP, BIA Schools, *supra* note 1025, at 12.

1050. GAO REP, BIA Schools, *supra* note 1025, at 15.

graduate from high school. Native American students are far more likely than other students to drop out of primary and secondary schools.¹⁰⁵¹ Additionally, Individuals working in Indian education are typically underpaid in comparison to colleagues in non-Indian schools. Tribal college full-time faculty, for example, are paid about half as much on average as their counterparts at non-tribal two-year institutions.¹⁰⁵²

The amount currently spent per student at BIA schools is equivalent to “an amount per student that public schools were spending twenty-years ago.”¹⁰⁵³ The Commission on Civil Rights reports that “funding for DOE’s Office of Indian Education (“OIE”) has remained a relatively small portion of the department’s total discretionary budget (ranging from 0.2 to 0.3%) between 1998 and 2003.”¹⁰⁵⁴

XVI. SELF-DETERMINATION AND SELF GOVERNANCE

A. *Indian Self-Determination*

The Indian Self-Determination and Education Assistance Act (“ISDEAA”),¹⁰⁵⁵ directs the Secretary of the Interior and the Secretary of Health and Human Services, upon the request of an Indian Tribe, to turn over to that Tribe the direct operation of its federal Indian programs.¹⁰⁵⁶ Once a Tribe requests control of its programs the Secretary and the Tribe enter into a “self-determination contract” which the statute specifies must incorporate the provisions of a mandatory model contract included in the text of the ISDEAA.¹⁰⁵⁷

The ISDEAA requires the Secretary to provide program funding, known as “base funding,” to contractors in an amount no less than the Secretary would have spent had he retained operation of the program.¹⁰⁵⁸ In addition to base funding, the Act requires the Secretary to provide funding of contract support costs (“CSCs”) although the obligation to provide CSCs is expressly subject to the availability of appropriations.¹⁰⁵⁹

Federal appeals courts in two circuits have held that federal agencies

1051. GAO REP, BIA Schools, *supra* note 1025, at 86.

1052. GAO REP, BIA Schools, *supra* note 1025, at 85-86.

1053. GAO REP, BIA Schools, *supra* note 1025, at 23.

1054. GAO REP, BIA Schools, *supra* note 1025, at xi.

1055. Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. § 450).

1056. 25 U.S.C. § 450f(a)(1) (2004).

1057. *Id.* § 450l(a), (c).

1058. 25 U.S.C. § 450j-1(a)(1) (2004).

1059. *Id.* § 450j-1(a)(2), j-1(a)(2)(b); *see Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996).

can't award full CSCs to tribes where Congress has not made sufficient funds available.¹⁰⁶⁰ These decisions essentially view self-determination agreements not as government procurement contracts, but rather, as governmental funding arrangements under which the tribes are substituted for a federal agency both in furnishing governmental services and in receiving federal funding for that purpose. More recently, however, the Federal Circuit Court of Appeals held that the Cherokee Nation was owed full contract support costs for administering such programs.¹⁰⁶¹ Both the Government and the Cherokee Nation have asked the Supreme Court to resolve the dispute.¹⁰⁶²

There are specific programs administered by the BIA that are not subject to contract under the ISDEAA because they are inherently federal functions, also called residual functions.¹⁰⁶³ The Secretary is precluded from contracting for programs that would impair her ability to discharge her trust responsibility to any Indian tribe or individuals¹⁰⁶⁴ and the Secretary must reserve funds for other tribes who would also be eligible for the administration of programs.¹⁰⁶⁵

The Indian Health Service ("IHS") is another major source of tribal self-determination contracts. Such contracts accounted for over half of the IHS FY 2004 budget of \$3.7 billion and funded tribal operation of almost one-third of IHS hospitals and three-quarters of its clinics and smaller facilities.¹⁰⁶⁶ Tribes and tribal groups, through contracts and compacts with the IHS operate 13 hospitals, 172 health centers, 3 school health centers, and 260 health stations (including 176 Alaska Native village clinics).¹⁰⁶⁷ The IHS, tribes, and tribal groups also operate 9 regional youth substance abuse treatment centers and 2,252 units of staff quarters.¹⁰⁶⁸

Upon receipt of a contract proposal, the Department must review and approve or decline the proposal within ninety-days; failure to act within the ninety-day period results in the award of a contract by operation of

1060. *Cherokee Nation v. Thompson*, 311 F.3d 1054 (10th Cir. 2002); *Shoshone-Bannock v. Thompson*, (9th Cir.2001); *Navajo Nation v. HHS*, 285 F.3d 864 (9th Cir. 2003).

1061. *Thompson v. Cherokee Nation*, 334 F.3d 1075 (Fed. Cir. 2003), *certiorari granted by Thompson v. Cherokee Nation of Okla.*, 2004 U.S. LEXIS 2028 (U.S. 2004); *Cherokee Nation v. Thompson*, 311 F.3d 1054 (10th Cir. 2002), *certiorari granted by Cherokee Nation of Okla. v. Thompson*, 2004 U.S. LEXIS 2027 (U.S. 2004).

1062. 25 U.S.C. § 450j-1(a)(2), j-1(a)(2)(b) (2004).

1063. *Id.* § 450f(a)(2)(E).

1064. *Id.* § 450j(g).

1065. *Id.* § 450j(i).

1066. <http://www.hhs.gov/budget/docbudget.htm>.

1067. Department of the Interior and Related Agencies Appropriation Bill, H.R. REP. NO. 108-542 (2005).

1068. *Id.*

law.¹⁰⁶⁹ A proposal may be declined only for one of five specific reasons.¹⁰⁷⁰ An appeal of the decision complained of must be filed within thirty-days.¹⁰⁷¹ A tribe filing an appeal may also go directly to federal court at any point.¹⁰⁷²

Generally, funds paid to a tribe and not expended or used for the purposes for which paid must be repaid to the Treasury of the United States.¹⁰⁷³ Tribes are required to submit to the Secretary a single-agency audit report for each fiscal year during which it receives or expends contract funds.¹⁰⁷⁴ The Department is barred from recovering disallowed costs unless it has given notice of such disallowance within 365 days of receipt of the tribe's single audit.¹⁰⁷⁵ There are special rules for post-award contract disputes.¹⁰⁷⁶ The ISDEAA imposes criminal penalties, including fines and imprisonment, upon officials and employees of contract recipients who willfully misapply or embezzle funds.¹⁰⁷⁷

An Indian tribe or tribal organization may retrocede a self-determination contract, in whole or in part.¹⁰⁷⁸ A "retrocession" is the voluntary return to the Secretary of a contracted program, in whole or in part, for any reason, before the expiration of the term of the contract.¹⁰⁷⁹ The Secretary may initiate a "reassumption" of a self-determination contract based upon a finding of gross negligence or mismanagement of the contract.¹⁰⁸⁰

B. Tribal Self-Governance

Self-Governance is an extension of the self-determination program, whereby tribes assume even greater control over a larger range of

1069. 25 U.S.C. § 450f(a) (2004); 25 C.F.R. § 900.18 (2004).

1070. *See* 25 U.S.C. § 450f (2004), 25 C.F.R. § 900.22 (2004). A contract may be declined only if the Secretary provides written notification that specifically finds, or is supported by controlling legal authority, that (1) the service to be rendered to the Indian beneficiaries will not be satisfactory; (2) adequate protection of trust resources is not assured; (3) the function cannot be properly maintained by the proposed contract; (4) the amount of funds proposed under the contract is in excess of the funds available; or (5) the services cannot be lawfully carried out by the contractor. *Id.*

1071. 25 U.S.C. § 450f(m-1) (2004), 25 C.F.R. § 900.150-169 (2004). Appeal procedures for most contract disputes are covered at and Subpart L of the regulations.

1072. 25 U.S.C. § 450f(b)(3), (m-1) (2004).

1073. *Id.* § 450c(d) (2004). For each fiscal year during which a self-determination contract is in effect, any savings under a self-determination contract may be expended by the tribe in the succeeding fiscal year. 25 U.S.C. § 450j-1(a)(4) (2004).

1074. *Id.* § 450c(f)(1).

1075. *Id.* § 450j-1(e).

1076. 25 C.F.R. § 900.215-230 (2004).

1077. 25 U.S.C. § 450d (2004).

1078. *Id.* § 450j(e); 25 C.F.R. § 900.241 (2004).

1079. 25 C.F.R. § 900.240 (2004).

1080. *Id.* § 900.247; 25 U.S.C. § 450m (2004).

programs, with minimal federal oversight. Congress created the Self-Governance program under Title II of the Indian Self-Determination and Education Assistance Act Amendments of 1994.¹⁰⁸¹ The Office of Self-Governance (“OSG”) is the office within DOI responsible for administering Tribal Self-Governance as it relates to BIA programs.¹⁰⁸² OSG may accept up to fifty tribes or consortia of tribes each year to participate in the program.¹⁰⁸³ Separate regulations specify the process for tribes seeking entry into the program.¹⁰⁸⁴

An Annual Funding Agreement (“AFA”) entered into by the BIA and a tribe specifies the programs transferred to the tribe and those retained by BIA.¹⁰⁸⁵ An AFA may not include programs, services, functions, or activities that are inherently federal or where the statute establishing the existing program does not authorize the type of participation sought by the tribe.¹⁰⁸⁶ The AFA must include an amount equal to what the tribe would have been eligible to receive under contracts and grants for direct programs and contract support costs under the self-determination program plus a negotiated share of any other funds otherwise available to tribes.¹⁰⁸⁷ An AFA may also be negotiated for non-BIA programs including DOI programs of special geographic, historical, or cultural significance to participating tribes.¹⁰⁸⁸

Self-governance tribes also must negotiate a self-governance “compact” which differs from the AFA in that parts of the compact apply to all bureaus within the DOI rather than just a single Bureau.¹⁰⁸⁹ DOI regulations detail the negotiation process for a compact and an AFA.¹⁰⁹⁰

BIA funding of an AFA must not result in a reduction of services or funds for which another tribe is eligible.¹⁰⁹¹ All regulations that govern the operation of programs included in an AFA apply as well to self-governance tribes unless waived by the Secretary.¹⁰⁹² DOI may reassume any program operated pursuant to an AFA upon a finding of imminent

1081. Pub. L. No. 103-413, 108 Stat. 4250 (codified at 25 U.S.C. § 458aa-gg). The amendments made permanent what had been a pilot “Tribal Self-Governance” program. *See* 25 C.F.R. § 1000.4 (2004).

1082. 25 C.F.R. § 1000.2 (2004).

1083. § 1000.14.

1084. *See id.* pt. 1001.

1085. § 1000.82.

1086. § 1000.92, .94.

1087. § 1000.91.

1088. § 1000.120-148.

1089. § 1000.161.

1090. § 1000.160-182.

1091. *See* § 1000.190-198.

1092. *See* § 1000.220-232. An AFA that includes a construction program is subject to additional regulations. *See id.* § 1000.190-198.

jeopardy to a physical trust asset, a natural resource, or public health and safety.¹⁰⁹³ A tribe may also retrocede a program included in an AFA.¹⁰⁹⁴

Annually, each AFA tribe as well as the Secretary must prepare a report on the self-governance program.¹⁰⁹⁵ Tribes may appeal Department decisions under the self-governance program to the IBIA for certain pre-AFA disputes and to the IBCA for certain post-AFA disputes though alternative dispute resolution is preferred.¹⁰⁹⁶

The Secretary is required to publish annually: (1) A list of non-BIA programs, services, functions, and activities, or portions thereof, that are eligible for inclusion in agreements negotiated under the self-governance program and (2) programmatic targets for these bureaus.¹⁰⁹⁷ Nevertheless, there are only a handful of Annual Funding Agreements between self-governance tribes and non-BIA bureaus of the Department.¹⁰⁹⁸

C. Contractor Tort Liability

For the first dozen years under the ISDEAA, tribal contractors generally assumed liability for accidents or torts (civil wrongdoings) caused by their employees. However, beginning in the late 1980s the federal government assumed this liability when Congress extended coverage under the Federal Tort Claims Act (“FTCA”) to tribal ISDEAA contractors.¹⁰⁹⁹ The FTCA permits the United States to be sued “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”¹¹⁰⁰

DOI regulations explain the coverage of the FTCA for medical and non-medical claims and the procedures for filing FTCA claims.¹¹⁰¹ A report by the General Accounting Office to the Senate Committee on

1093. See § 1000.300-318.

1094. See § 1000.330-339.

1095. See § 1000.380-382.

1096. § 1000.420-438.

1097. 25 U.S.C. § 405(c) (2004).

1098. List of Programs Eligible for Inclusion in Fiscal Year 2004 Annual Funding Agreements To Be Negotiated With Self-Governance Tribes by Interior Bureaus Other Than the Bureau of Indian Affairs, 68 Fed. Reg. 71122 (Dec. 22, 2003). The Bureau of Reclamation and the National Park Service each have four such agreements with tribes. There are no such tribal agreements with the Bureau of Land Management, Minerals Management Service, Office of Surface Mining and Reclamation Enforcement, U.S. Fish and Wildlife Service, and U.S. Geological Survey, although each of these agencies has programs that are eligible for such agreements. *Id.*

1099. 25 U.S.C. §§ 450f, 2804(f) (2004).

1100. 28 U.S.C. § 1346(b) (2004).

1101. 25 C.F.R. § 900.180-210 (2004).

Indian Affairs¹¹⁰² identified 342 claims filed from 1997 through 1999 with one-third of them against Indian Health Service contractors and two-thirds against BIA contractors that mostly involved law enforcement. The claims involved a small number of tribes but sought \$700 million in damages.¹¹⁰³

The Report identifies, but does not attempt to resolve, four unique legal issues arising from FTCA coverage of tribal contractors: 1) the FTCA does not provide statutory authority for removing FTCA cases filed in tribal courts, unlike state courts, 2) questions have arisen whether adjudication of claims should be based on tribal law or state law, 3) it has been argued that tribal law enforcement officers should be considered federal law enforcement officers, thus subjecting them to claims for intentional as well as negligent torts, and 4) it is unclear to what extent tribal council members and other indirect tribal employees may be covered by the FTCA.¹¹⁰⁴

D. Self-Governance and the Trust Responsibility

The fact that a tribe performs BIA realty functions under a Self-Governance compact does not diminish the trust responsibility of the United States for that tribe's trust land even when the tribe provides BIA services to its own land.¹¹⁰⁵ The United States, not the Tribe, will be the trustee regardless of whether BIA or the Nation provides BIA realty services to the land.¹¹⁰⁶ The regulations include provisions for a system of trust evaluations when a tribe performs trust functions under an AFA.¹¹⁰⁷

Tribes naturally want to preserve the benefits of the trust, for example, assistance with management of tribal resources and the ability to sue the government for failure to protect resources. However, many tribes do not want even minimal government oversight of tribal management. In testimony before the Senate Committee on Indian Affairs, the vice-president of the NCAI bitterly attacked

1102. GAO, Report to the Chairman, Committee on Indian Affairs, U.S. Senate, Federal Tort Claims Act Issues Affecting Coverage for Tribal Self-Determination Contracts, GAO/RCED-00-169 (July 2000).

1103. *Id.* at 4.

1104. *Id.* at 17-18. For an argument in favor of applying tribal law as "the law of the place" under the FTCA, see Katherine C. Pearson, *Departing from the Routine: Application of Indian Tribal Law Under the Federal Tort Claims Act*, 32 ARIZ. ST. L.J. 695 (Summer 2000).

1105. 25 U.S.C. § 458cc(b)(9); *see also* § 203(4) of the Tribal Self-Governance Act of 1994, 25 U.S.C. § 458aa (2004).

1106. Okla. Petroleum Marketers Ass'n et al. v. Acting Muskogee Area Dir., 35 IBIA 285 (2000).

1107. *See* 25 C.F.R. § 1000.350-367 (2004).

recommendations by the National Academy of Public Administration that called for increased BIA funding in order to improve its management and administrative capacity in regard to Self-Determination and other programs.¹¹⁰⁸ NCAI vice-president W. Ron Allen suggested that a stronger BIA might imperil tribal self-governance and he challenged the Academy's suggestion that lack of BIA oversight creates a potential for tribal abuse.¹¹⁰⁹ Allen dismissed much of the Academy's report as being "more focused on the BIA's loss of control over the tribes than the success of the devolution movement in the Self-Governance initiative."¹¹¹⁰

Yet without such oversight, it may be difficult to reconcile the trust responsibility with tribal self-governance, as recognized by the Tribal Government Task Force of the AIPRC.

Clearly, the trust responsibility of the Federal Government, as exercised by BIA officials, requires that they have authority to control the use, management and disposition of tribal trust resources or income from trust resources. The theory for this source of authority is not viewed as objectionable by the tribes. They recognize that under the law, one simply cannot be a trustee and at the same time have no control over the corpus of the trust. If Indian Tribal Governments were to be recognized as possessing ultimate control over the use and disposition of tribal trust resources, then under the law, there is no way that the Federal Government could be held responsible. In effect, this would imply a termination of the trust responsibility.¹¹¹¹

Moreover, the courts have held that the federal government has a legitimate need and responsibility to ensure that federal and tribal trust resources are not misused, and that failure to do so may itself be a breach of trust.¹¹¹² Federal officials are frequently required to investigate allegations of financial mismanagement, corruption and abuse of power by tribal officials.¹¹¹³ In a particularly shocking case, the long-time Chief

1108. *NAPA*, *supra* note 27, Testimony of W. Ron Allen, Vice President, National Congress of American Indians.

1109. *NAPA*, *supra* note 27, Testimony of W. Ron Allen, Vice President, National Congress of American Indians.

1110. *NAPA*, *supra* note 27, Testimony of W. Ron Allen, Vice President, National Congress of American Indians.

1111. AIPRC, *supra* note 39, TRIBAL GOV'T. REPORT at 14 (1976).

1112. Where a treaty required the United States to pay funds to tribal members, it was liable when it paid the money instead to the tribal government which was known to be misappropriating it. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (The Government was to "be judged by the most exacting fiduciary standards.").

1113. For example, three members of the Skull Valley Band of Goshute Indians and their

of the Choctaw Nation of Oklahoma allegedly oversaw a decades-long reign of terror, including sexual abuse of tribal employees.¹¹¹⁴

Ongoing oversight by the BIA, combined with technical assistance, is essential to preventing and detecting such abuses, according to a report of a Special Committee on Investigations of the Senate Indian Affairs Committee.

While Indian citizens often live in poverty, bereft of the economic opportunities available to other Americans, they have fallen prey to the actions of certain corrupt officials. American Indians cannot afford corruption. Tribal governments, as well as the federal system in which they operate, must not spare any effort or expense to root out corruption, no matter where it is found.¹¹¹⁵

Unfortunately, the Committee concluded, such vigilance has been lacking.

attorney were charged with embezzlement and bank fraud after the four accessed more than \$1 million in tribal accounts during a tribal leadership struggle related to the small tribe's plans to operate a multibillion-dollar storage site for high-level nuclear waste at its Skull Valley Reservation. See Judy Fahys, *Goshutes, lawyer plead not guilty to embezzlement, fraud*, SALT LAKE TRIB., Jan. 10, 2004, at B3. The FBI and the NIGC are investigating alleged misuse of casino profits by Cheyenne and Arapaho tribal officials in Oklahoma. *FBI agents interviewing 75 Cheyenne-Arapahos*, *Indianz.com*, June 10, 2004, at <http://64.62.196.98/News/2004/002867.asp?print=1>. Leaders of the Seminole Tribe of Florida allegedly misspent tens of millions of dollars for luxury cars and gifts. Jeff Testerman, *Government Tells Tribe to Toe Line on Casinos*, ST. PETERSBURG TIMES, Feb. 25, 2004, available at http://www.sptimes.com/2004/02/25/State/Government_tells_trib.shtml. The Tulalip Tribes recently disbanded their housing authority after HUD said the housing authority has mismanaged more than \$6 million in federal funds. See Emily Heffter, *Tulalips Dissolve Housing Authority*, SEATTLE TIMES, Aug. 19, 2004, at A1.

1114. In *United States v. Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999), cert. denied 529 U.S. 1108 (2000), the court portrayed an all-powerful and tyrannical tribal chief.

Mr. Roberts was the longtime tribal Chief who could, and did, call subordinate female employees to his private office at the tribal headquarters where he then sexually abused them, secure in the knowledge the power and influence of his position would allow him to engage in these repeated attacks, over the course of many years, without oversight. Several women testified they did not initially report him out of fear he would use his power and influence to retaliate, either by terminating their employment, denying family members tribal benefits, or causing physical harm to them. When this case became public, family members of several victims acknowledged Mr. Roberts' behavior, but urged the women not to participate. Because she agreed to testify, at least one woman no longer has contact with her parents, and others maintain strained relationships with family members. Beyond the victims and their families, Mr. Roberts appears to have exerted significant influence over employment, economics, politics, and daily life of all members of the Choctaw Nation and the entire town of Durant, Oklahoma. As a result, even after acknowledging the abuse and assaults, many individuals were wary of supporting the victims of the offenses, and, in fact, strongly encouraged the women to maintain their silence.

Id.

1115. *Special Committee on Investigations, FINAL REP. AND LEGISLATIVE RECOMMENDATIONS*, *supra* note 24, at 181.

The litany of examples uncovered by the Special Committee indicates a pattern of abuse that must be redressed. While these abuses occur in any government – federal, state or local – what is not normal is that no matter how flagrant the conduct, Congress and the entire federal government have ignored it, aiding and abetting in the cycle of despair among American Indians. If tribal governments are to function as representatives of their people, then they must also be strong enough to be accountable to their people by not tolerating corruption, no matter what guise it hides behind.¹¹¹⁶

XVII. TRUST FUND MANAGEMENT AND REFORM

A. *Trust Funds Management*

Historically, the BIA manages certain funds on behalf of individual Indians and tribes, pursuant to a variety of federal statutes.¹¹¹⁷ The current arrangement has its roots in historically shifting federal policies. Pursuant to the General Allotment Act of 1887,¹¹¹⁸ lands that had previously been set aside for Indian tribes were allotted to individual Indians in fixed amounts and “surplus” lands were opened to non-Indian settlement. The Act created a system in which allotted lands would be held in trust by the United States for twenty-five years or more during which period an individual account (“Individual Indian Money” account or “IIM” account) would be created for each Indian with an interest in the allotted lands. The United States would manage the lands for the benefit of the allottees until the expiration of the trust period at which time each allottee would be issued a fee patent.

The Indian Reorganization Act of 1934¹¹¹⁹ ended the practice of allotment but extended indefinitely the trust period for already-allotted lands. Through the operation of these two statutes, the United States came to hold over ten million acres of land as trustee for, and with a fiduciary duty to individual Indian beneficiaries.

Interior has responsibility for what may be the largest land trust in the world. The Indian trust today encompasses approximately 56 million acres of land – over ten million acres belonging to individual Indians

1116. *Special Committee on Investigations*, FINAL REP. AND LEGISLATIVE RECOMMENDATIONS, *supra* note 24, at 203.

1117. *E.g.*, 25 U.S.C. §§ 161a, 162a, 164 (2004).

1118. Ch. 119, 24 Stat. 388 (1887) (formerly codified at 25 U.S.C. § 331).

1119. Ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. § 461).

and nearly 45 million acres owned by Indian tribes. On these lands, Interior manages over 100,000 leases for individual Indians and tribes. Leasing, use permits and sales revenues of approximately \$300 million per year are collected and distributed to approximately 236,000 Individual IIM accounts, and about \$800 million per year is distributed to about 1,400 tribal accounts. In addition, the trust manages approximately \$2.6 billion in tribal funds and \$400 million in individual Indian funds.¹¹²⁰

Primary responsibility for the awesome task of managing these lands and the funds they generate fell to the BIA with some help from the MMS.¹¹²¹ The Treasury Department also has some responsibilities that “include holding and investing IIM trust funds at the direction of Interior, as well as maintaining central records related to these functions.”¹¹²²

A 1992 congressional report harshly criticized the DOI and the BIA for mismanagement of the IIM trust accounts.¹¹²³ The Congressional Oversight Committee found:

(1) inadequate systems for accounting for and reporting trust fund balances; (2) inadequate controls over receipts and disbursements; (3) absence of periodic, timely reconciliations to assure accuracy of accounts; (4) inability to determine accurate cash balances; failure to consistently and prudently invest trust funds and/or pay interest to accountholders; (5) inability to prepare and supply accountholders with meaningful periodic statements of their account balances; (6) absence of consistent, written policies and procedures for trust fund management and accounting; and (7) inadequate staffing, supervision, and training.¹¹²⁴

Noting the historic and pervasive nature of the deficiencies, the Committee expressed skepticism about the ability of the BIA to significantly improve its performance.¹¹²⁵

1120. <http://www.doi.gov/news/fiduciaryobligations.pdf> (Fiduciary Obligations Compliance Plan, January 6, 2003), at 3 [hereinafter FIDUCIARY OBLIGATIONS COMPLIANCE PLAN].

1121. *Id.* at 22. MMS manages the collection and accounting of royalties and rentals received from producing Indian mineral leases.

1122. *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 11 (D.D.C. 1999).

1123. COMMITTEE ON GOVERNMENT OPERATIONS, MISPLACED TRUST: THE BUREAU OF INDIAN AFFAIRS' MISMANAGEMENT OF THE INDIAN TRUST FUND, H.R. REP. NO. 102-499 (1992).

1124. *Id.* at 59.

1125. *Id.* at 65-66.

B. Trust Fund Reform

In 1994, Congress enacted the Indian Trust Fund Management Reform Act¹¹²⁶ that required the Secretary of the Interior to account for “all funds held in trust by the United States for the benefit” of Indians and Indian tribes, to report quarterly to account holders, and to conduct an annual audit.¹¹²⁷ Congress established within the DOI the Office of Special Trustee for American Indians (“OST”)¹¹²⁸ to oversee all reform efforts within BIA, BLM and MMS with respect to management of Indian trust funds.¹¹²⁹ These efforts have led as well to the creation of the Office of Trust Funds Management (“OTFM”) within the OST.¹¹³⁰

DOI regulations concerning IIM accounts and tribal trust accounts are found in 25 C.F.R. § 115 (2004). They provide that adults normally have the right to withdraw funds from their accounts upon request¹¹³¹ unless they are under a legal disability.¹¹³² The BIA may apply IIM funds against delinquent debts to the United States or the individual’s tribe “and against money judgments rendered by courts of Indian offenses or under any tribal law and order code.”¹¹³³ The account holder is entitled to challenge the decision of the BIA to restrict or make payments from an IIM account.¹¹³⁴ The BIA supervises accounts established for minors in consultation with the custodial parent or guardian.¹¹³⁵ The OTFM establishes an estate account when it learns of an account holder’s death until it is distributed in accordance with a probate order.¹¹³⁶

Only funds from specified sources, including certain payments from the United States derived from the administration of trust assets, may be placed into an IIM account.¹¹³⁷ The OTFM manages the investment of the trust funds.¹¹³⁸ The OTFM establishes a tribal trust fund account when it receives tribal funds derived from tribal trust assets.¹¹³⁹ Tribes

1126. Pub. L. No. 103-412, 108 Stat. 4239 (1994) (codified as amended at 25 U.S.C. § 4001 (2004)).

1127. 25 U.S.C. § 4011 (2004).

1128. § 4042.

1129. § 4043.

1130. FIDUCIARY OBLIGATIONS COMPLIANCE PLAN, *supra* note 1120, at 3; *see* 25 C.F.R. pt. 1200 (2004).

1131. 25 C.F.R. § 115.101 (2004).

1132. § 115.102.

1133. § 115.104; *see also id.* § 11.208.

1134. § 115.600-620.

1135. § 115.400-431.

1136. § 115.500-504.

1137. § 115.700-709.

1138. § 115.711.

1139. § 115.800.

may take an active role in the investment of their trust funds.¹¹⁴⁰ Records that evidence the management of trust funds, including those made by a tribe that is operating a federal trust program, must be maintained in compliance with Departmental procedures¹¹⁴¹ and the Federal Records Act.¹¹⁴² Under the American Indian Trust Fund Management Reform Act,¹¹⁴³ Tribes may assume from the Department responsibility for managing their own tribal funds pursuant to Departmental regulations.¹¹⁴⁴ Tribes may also choose to assume management under the ISDEAA¹¹⁴⁵ or the Tribal Self-Governance Amendments of 2000.¹¹⁴⁶ Separate BIA regulations control the management of specialized trust funds.¹¹⁴⁷

C. Cobell¹¹⁴⁸

Impatient with the pace of trust fund reform, Native American beneficiaries of IIM accounts filed a class action to establish their right to compel an accounting.¹¹⁴⁹ Both the District Court¹¹⁵⁰ and the U.S. Court of Appeals for the D.C. Circuit¹¹⁵¹ have extensively set out the underlying facts of the case. The District Court has declared that for purposes of this litigation the primary duty with respect to trust fund management is that Interior, as required by the American Indian Trust Fund Management Reform Act,¹¹⁵² “provide plaintiffs an accurate

1140. § 115.800-814.

1141. § 115.1000-1001.

1142. 44 U.S.C. §§ 29, 31, 33, 39 (2004).

1143. Pub. L. No. 103-412, 108 Stat. 4239 (codified by 25 U.S.C. §§ 4001-4061).

1144. 25 C.F.R. pt. 12 (2004).

1145. 25 U.S.C. § 450 (2004).

1146. § 458.

1147. *E.g.*, on behalf of members of certain tribes and funds the Osage Tribe who do not have certificates of competency (25 C.F.R. pt. 117 (2004)) and the management of Osage judgment funds for education (25 C.F.R. pt. 122 (2004)). All federal agencies and the State of Alaska are bound by regulations governing the deposit of proceeds derived from lands withdrawn for Native selection pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1628 (2004). *See* 25 C.F.R. pt. 124 (2004). A series of regulations provide for the partial repayment of construction charges on Indian irrigation projects. *See* 25 C.F.R. pt. 134 (2004); *see also* 41 Stat. 409, 25 U.S.C. § 386 (2004). More specific regulations apply to the Crow Indian Irrigation Project, 25 C.F.R. pt. 135 (2004); 60 Stat. 333-338; Fort Hall Irrigation Project, 25 C.F.R. pt. 136 (2004); 46 Stat. 1063; San Carlos Indian Irrigation Project, 25 C.F.R. pt. 137 (2004); 43 Stat. 475; Wapato Indian Irrigation Projects, 25 C.F.R. pts. 138, 139 (2004); 41 Stat. 409, 45 Stat. 210.

1148. *Cobell v. Babbitt*, 52 F. Supp. 2d 11 (D.D.C. 1999), *aff'd sub. nom.* 240 F.3d 1081 (C.A.D.C. 2001).

1149. *Id.*

1150. *See, e.g.*, *Cobell v. Babbitt*, 30 F. Supp. 2d 24, 27-29 (D.D.C. 1998).

1151. *See Cobell v. Norton*, 240 F.3d 1081, 1086-92 (D.C. Cir. 2001).

1152. 25 U.S.C. §§ 162(a), 4011 (2004).

accounting of all money in the IIM trust”¹¹⁵³

Several years later, Interior has found itself still having to defend an alleged inability to adequately perform its responsibilities. According to a 2001 U.S. General Accounting Office (“GAO”) report the DOI was unable to assure trust account holders that their balances were accurate or that their assets were being properly managed.¹¹⁵⁴ In response to a GAO request for accurate information, DOI had to correct thousands of inaccurate, incomplete, or outdated entries.¹¹⁵⁵ Despite actions taken by the DOI to address management problems, in 2003 the GAO reported that additional weaknesses, including inadequate accounting and information systems and internal controls, still prevented the DOI from ensuring the proper management of funds.¹¹⁵⁶

Interior argues that the trust it manages is not the typical corpus managed by a private sector trustee where fees are charged as part of normal business practices for the services delivered:

The Federal Government bears the entire cost of administering the Indian trust. As a result usual incentives found in the private sector for reducing or paying for the management of the trust do not apply to the Indian trust. For instance, thousands of accounts must be maintained for IIM account holders that contain less than one dollar. In order to meet its trust goals and obligations, Interior continues to request significant budget resources. However, to meet the expectations of both Interior and its beneficiaries, Congress must appropriate these funds.¹¹⁵⁷

Despite such claims of insufficient funding from Congress, the Secretary was found by the *Cobell* District Court to be in breach of trust for failure to timely perform fiduciary duties.¹¹⁵⁸ The D.C. Circuit agreed, finding that the Government “does not know the precise number of IIM trust accounts that it is to administer and protect” and “it does not know the proper balances for each IIM account.”¹¹⁵⁹

The government’s broad duty to provide a complete historical accounting to IIM beneficiaries necessarily imposes substantial

1153. *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 58 (D.D.C. 1999).

1154. U.S. GENERAL ACCOUNTING OFFICE, PERFORMANCE AND ACCOUNTABILITY SERIES: MAJOR MANAGEMENT CHALLENGES AND PROGRAM RISKS, at 8-9 (January 2001).

1155. *Id.*

1156. *Id.*, at 14 (January 2003).

1157. FIDUCIARY OBLIGATIONS COMPLIANCE PLAN, *supra* note 1120, at 6.

1158. *Cobell v. Babbitt*, 91 F. Supp. 2d 1 (D.D.C. 1999).

1159. *Cobell v. Norton*, 240 F.3d 1081, 1089 (D.C. Cir. 2001).

subsidiary duties on those government officials with responsibility for ensuring that an accounting can and will take place. In particular, it imposes obligations on those who administer the IIM trust lands and funds to, among other things, maintain and complete existing records, recover missing records where possible, and develop plans and procedures sufficient to ensure that all aspects of the accounting process are carried out.¹¹⁶⁰

The D.C. Circuit further affirmed the District Court's conclusion that the defendants were in breach of these fiduciary duties, finding that "the Department [of Interior] is still unable to execute the most fundamental of trust duties—an accurate accounting."¹¹⁶¹

Cobell has dominated the actions of the BIA for several years. The litigation has been unusually bitter, has driven a wedge between the tribes and the BIA, and has contributed to a significant breakdown in morale within Interior.¹¹⁶² The toxic tenor of the litigation has also fractured the BIA's relationship with Indian advocates to an extent not seen in decades.¹¹⁶³ One observer blames the District Court Judge for the extreme hostility engendered by the case citing his allegedly "intolerable" and "abusive" behavior toward the government parties and their attorneys.¹¹⁶⁴ Similarly addressing Judge Royce Lamberth's

1160. *Id.* at 1105.

1161. *Id.* at 1105-08, 1110.

1162. *See, e.g.*, Deirdre Davidson, *Indian Trust Suit Takes Toll at Interior: Employees Fleeing Case, Buying Personal Liability Insurance*, LEGAL TIMES, Mar. 25, 2002, at 1.

1163. The *Cobell* class plaintiffs are represented by the Native American Rights Fund ("NARF"), a non-profit organization that provides legal representation and technical assistance to Indian tribes, organizations and individuals nationwide. *See* <http://www.narf.org>. As the litigation continues the parties have begun to explore a mediated resolution at the urging of the Chairmen and Ranking members of both the House Resources Committee and the Senate Committee on Indian Affairs. However, these efforts have so far only served to illustrate and perhaps deepen the gulf between the parties as plaintiffs' counsel has accused the government of breaking promises and refusing to negotiate in good faith. H.R. COMM. ON INDIAN AFFAIRS, 108TH CONG., REPORT ON METHODOLOGIES FOR SETTling THE *COBELL V. NORTON* CLASS ACTION LAWSUIT (1st Sess. 2003) (Testimony of John E. Echohawk, Executive Director, Native American Rights Fund). *See* <http://indian.senate.gov>. The view is shared by some in the media. *See, e.g.*, *Settle a Shameful Case of Indian Trust Money*, SEATTLE TIMES, *supra* note 15; *A Continuing Shame*, N.Y. TIMES, *supra* note 15.

1164. Richard J. Pierce, Jr., *Judge Lamberth's Reign of Terror at the Department of [the] Interior*, 56:2 ADMIN. L.J. 235, 236 (2004). Professor Pierce notes that "Judge Lamberth has held two Secretaries of [the] Interior, a Treasury Secretary, and two Assistant Secretaries of [the] Interior in contempt" and that he "has compelled eighty government attorneys to defend themselves against charges of contempt." *Id.* Professor Pierce also filed a judicial misconduct complaint that accused Judge Lamberth of "defamatory characterizations of numerous government employees," holding officials in contempt with "no basis in law or fact," threatening to hold others in contempt and ordering a computer shutdown "with no adequate basis in law or fact to support that extraordinary action." *Id.* The D.C. Judiciary Council rejected the allegations on July 9, 2004, upholding an earlier decision written by David B. Sentelle, an appeals court judge who said the complaint was without

repeated findings that the government engaged in litigation misconduct in defending the case, another commentator found no evidence that the Court had abused its contempt powers, concluding instead that the government's "vigorous defense" has been a disservice to the interests of the general public in having justice prevail.¹¹⁶⁵

Judge Lamberth of the District Court has indeed attacked the Department in decision after decision, noting in a relatively early opinion that "I have never seen more egregious misconduct by the federal government."¹¹⁶⁶ Several years later, in a contempt ruling against the Secretary of the Interior, the Assistant Secretary of Interior for Indian Affairs and several attorneys in the Office of the Solicitor wrote:

Now, at the conclusion of the second contempt trial in this action, I stand corrected. The Department of Interior has truly outdone itself this time. The agency has indisputably proven to the Court, Congress, and the individual Indian beneficiaries that it is either unwilling or unable to administer competently the IIM trust. Worse yet, the Department has now undeniably shown that it can no longer be trusted to state accurately the status of its trust reform efforts. In short, there is no longer any doubt that the Secretary of Interior has been and continues to be an unfit trustee-delegate for the United States.¹¹⁶⁷

On appeal, the D.C. Circuit broadly affirmed the district court's first contempt order, describing the relief it granted as "relatively modest."¹¹⁶⁸ Although reversing the latest contempt ruling the Circuit Court did not condone the government's conduct.¹¹⁶⁹ On December 10, 2004, in a much-anticipated ruling, the appeals court vacated parts of Judge Lamberth's order that Interior perform an historical accounting of IIM funds, as well as his mandate that Interior produce a detailed plan to

merit and didn't have a cause of action. Professor Pierce "failed to provide any specific evidence that would cause a reasonable observer to doubt the subject judge's impartiality," Sentelle wrote on May 17. See, *Lamberth exchanges harsh words with Cobell critic*, Indianz.com, August 2, 2004, at <http://64.62.196.98/News/2004/003652asp?print=1>. Judge Lamberth filed his own thirty-seven page response, accusing Pierce of sloppy scholarship and worse, asserting the charges were filed "without benefit of research, without supporting documentation, and apparently without considering the consequences of doing so under penalty of perjury." This document is available at <http://www.indiantrust.com>.

1165. Daniel S. Jacobs, *The Role Of The Federal Government In Defending Public Interest Litigation*, 44 SANTA CLARA L. REV. 1, 37-38 (2003).

1166. *Cobell v. Babbitt*, 37 F. Supp. 2d 6, 38 (D.D.C. 1999).

1167. *Cobell v. Norton*, 226 F. Supp. 2d 1 (D.D.C. 2002) (Opinion), *vacated by, in part, remanded by Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003).

1168. *Cobell v. Norton*, 240 F.3d 1081, 1009 (D.C. Cir. 2001).

1169. *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003).

“fix” the IIM trust management system.¹¹⁷⁰

Here we address a district court injunction issued September 25, 2003. *Cobell v. Norton*, 283 F. Supp. 2d 66 (D.D.C. 2003) ("*Cobell X*"). The decree, see *id.* at 287-95, imposes obligations on the defendants in two main categories. Duties related to "Historical Accounting" are intended to unravel the tangle resulting from past accounting failures, see *id.* at 70-211; those related to "Fixing the System" are intended to compel the issuance of a plan for future trust administration as a whole, see *id.* at 239-87. To assure fulfillment of both sets of duties, the court appointed a court monitor to oversee compliance and said it would retain jurisdiction until December 31, 2009. These two different sets of commands raise quite different issues.

“Historical Accounting” we find, is governed by Pub. L. No. 108-108, a provision adopted after the district court opinion issued, which radically changes the underlying substantive law and removes the legal basis for the historical accounting elements of the injunction. We therefore vacate those elements.

The core of “Fixing the System,” by contrast, requires the Interior defendants to produce a “plan” that would fix the IIM trust management system, and requires the Interior defendants to explain how the Department will comply with various constraints or objectives identified by the court, such as sixteen specific common law trust duties and tribal law. Although we agree that Interior is subject to many of the common law trust duties identified by the court, we find that much of the “Fixing the System” injunction exceeds the court’s remedial discretion because the court failed to ground it in the defendants’ statutory trust duties and in specific findings that Interior breached those duties. Aside from the requirement that Interior complete its so-called “To-Be Plan,” as promised in its Comprehensive Plan, we thus vacate the district court’s injunction and remand for further proceedings consistent with this opinion.¹¹⁷¹

Judge Lamberth has been especially livid about security lapses in the Department’s electronic records management systems. The failure of Department to ensure security and maintenance of information regarding

1170. *Cobell v. Norton*, No. 03-5314, 2004 WL 25473 (D.C. Cir. Dec. 10, 2004).

1171. *Id.* at 5-7. The order to perform an accounting could be reinstated after the end of the year 2004, however, upon lapse of the statute that barred the accounting. *Id.* at 18.

IIM funds was found to be a breach of trust.¹¹⁷² On July 28, 2003, the Court issued a preliminary injunction requiring the Department of the Interior to “immediately disconnect from the Internet all Information Technology Systems within [its] custody or control . . . until such time as the Court approves their reconnection to the Internet.”¹¹⁷³ A preliminary injunction of March 15, 2004, superseded and replaced the injunction of July 28, 2003, requiring disconnection of substantially all of the Department of the Interior's computer systems from the Internet, and ordering the Secretary to submit a plan for secure reconnection of Interior's computer systems. *Cobell v. Norton*, 310 F. Supp. 2d 77 (D.D.C. 2004).¹¹⁷⁴

We hold, contrary to the Secretary's contention, that issuance of the March 15, 2004 injunction is not precluded by Pub. L. 108-108, 117 Stat. 1241, 1263 (2003), which applies only to “historical accounting activities.” As the district court noted, “Interior's present obligation to administer the trust presents sufficient grounds for finding that Plaintiffs will be irreparably injured.” *Cobell XI*, 310 F. Supp. 2d at 96 n.27. We further hold that the district court's jurisdiction properly extends to security of Interior's information technology systems (“IT”) housing or accessing IITD [individual Indian trust data], because the Secretary, as a fiduciary, is required to maintain and preserve IITD. We nevertheless vacate the injunction because the district court erred by placing the burden of persuasion upon the Secretary, disregarding Interior's certifications on the state of IT security, and failing to hold an evidentiary hearing prior to entering the injunction.¹¹⁷⁵

The District Court also has sharply limited Interior's ability to communicate with trust account holders, initially prohibiting DOI from communicating with class members to “discuss this litigation, or the claims that have arisen therein, without prior authorization from this Court.”¹¹⁷⁶ At the urging of plaintiffs, Judge Lamberth entered yet another order on September 29, 2004, specifically prohibiting DOI employees from communicating with any member of the plaintiff class “regarding the sale, exchange, transfer, or conversion of any Indian trust land unless such communication is conspicuously marked with a notice

1172. *Cobell v. Norton*, 226 F. Supp. 2d 1 (D.D.C. 2002).

1173. *Cobell v. Norton*, 274 F. Supp. 2d 111, 135 (D.D.C. 2003).

1174. *Cobell v. Norton*, No. 03-5262, 2004 WL 2753197 (D.C. Cir. Dec. 3, 2004).

1175. *Id.* at 2-3.

1176. *Cobell v. Norton*, 2004 U.S. Dist. LEXIS 19449 (Sept. 29, 2004). See the Order at <http://www.indiantrust.com>.

that has been previously submitted to and approved by this Court.”¹¹⁷⁷ The order further provides that communication may proceed only if the class member waives his or her right to consult class counsel after receipt of the court-approved notice.¹¹⁷⁸

Interior says the cost of managing the IIM trust and the additional cost of performing an historical accounting may far outstrip the amount of money contained in the accounts. According to Senate testimony of the Associate Deputy Secretary of Interior there was only \$440 million deposited in the IIM trust fund for account holders as of September 30, 1991; approximately 95% of the transactions are under \$500 and about 80% of the transactions are under \$50.¹¹⁷⁹ “An historical accounting will cost, at a minimum, several hundred millions of dollars and take years to complete,” testified James Cason, adding that despite media and other statements claiming up to \$176 billion are owed the IIM account holders “at the end of the accounting, many individuals may see very little, if any, additional money in their accounts.”¹¹⁸⁰ Counsel for plaintiffs reject Interior’s characterization of *Cobell*, insisting that the case is not just about money but also about fixing the IIM trust system, providing the IIM beneficiaries with an accounting, and correcting the IIM account balances to reflect their true value. John Echohawk, Executive Director of the Native American Rights Fund (“NARF”), told Congress that resolution of the case must address each of these objectives.¹¹⁸¹

Proposals for reform of trust fund management have run the gamut. Senate leaders proposed that Indian tribes and beneficiaries directly manage or co-manage trust funds assets along with Interior.¹¹⁸² After a tumultuous dispute over early DOI proposals, a DOI Task Force with some tribal representation has attempted to develop alternatives involving reorganization of Interior.¹¹⁸³ The *Cobell* plaintiffs have argued

1177. See the Order at <http://www.indiantrust.com>.

1178. *Id.*; see also, John Files, *U.S. Is Ordered to Tell Indians Before Selling Trust Property*, N.Y. TIMES, Oct. 4, 2004, at A17. In subsequent orders the Court set forth the proper form of the required notice, *Cobell v. Norton*, 224 F.R.D. 266 (D.D.C., Oct. 22, 2004), and provided further clarifications, *Cobell v. Norton*, 2004 U.S. Dist. LEXIS 23097 (D.D.C., Nov. 17, 2004).

1179. *The Indian Trust Fund Lawsuit: Oversight Hearing Before the Senate Comm. on Indian Affairs*, 108th Cong. 1st Sess., (July 30, 2003) (statement of James Cason, Associate Deputy Secretary) available at <http://indian.senate.gov/2003hrsgs/073003hrsg/cason.PDF> (Senate Committee on Indian Affairs, 108th Congress - 1st Session, Hearing List).

1180. *Id.*

1181. *Methodologies for Settling the Cobell v. Norton Class Action Lawsuit: Before the Senate Comm. on Indian Affairs*, 108th Cong. 1st Sess., (July 30, 2003) (testimony of John E. Echohawk, Executive Director, Native American Rights Fund) available at <http://indian.senate.gov/2003hrsgs/073003hrsg/echohawk.PDF> (Senate Committee on Indian Affairs, 108th Cong. - 1st Sess., Hearing List).

1182. Indian Trust Asset and Trust Fund Management and Reform Act of 2002, S. 2212, 107th Cong. (2002).

1183. Tribal Leader/Department of the Interior Task Force on Trust Reform Report For the

for placement of the IIM trust in the care of a receiver appointed and supervised by a federal court and operating under court supervision.¹¹⁸⁴ A former Special Trustee for American Indians, Paul M. Homan, proposed the establishment of an independent government sponsored enterprise with responsibilities for trust resource management, trust funds management, and land title and records management.¹¹⁸⁵ So far, there has been surprisingly little scholarship concerning trust reform.¹¹⁸⁶

D. Tribal Trust Funds

Many tribes have become concerned that the Department's preoccupation with *Cobell* has seriously drained limited resources and attention to other matters. One tribal leader – speaking on behalf of tribes that have relatively few IIM account holders - expressed this in rather blunt terms.

Congress does not have the money to award the large settlement that is due them. A large award to the plaintiffs will inevitably hurt the rest of Indian country during these hard economic and budget restricted times. It is time to introduce legislation that will bring a fair settlement to the ongoing litigation. USET is in favor of looking at possible settlement legislation and working with Congress to develop a resolution to the case. The *Cobell* litigation is a drain on the federal government and is depleting funding that could go to other Indian programs or to enhance the re-organization effort. We must get beyond *Cobell* in order to realize true and lasting trust reform.¹¹⁸⁷

Other tribes have expressed a somewhat different concern that the funds

Secretary of the Interior, June 4, 2002, available at <http://www.doi.gov/news/finalreport.html>.

1184. See Indian Trust: *Cobell v. Norton*: An Overview, at <http://www.IndianTrust.com/overview.cfm>.

1185. SENATE COMM. ON INDIAN AFFAIRS, 107TH CONG. – 2ND SESS., ON THE ROLE OF THE SPECIAL TRUSTEE WITHIN THE DEPARTMENT OF THE INTERIOR (Sept. 24, 2002) (statement of Paul M. Homan, Former Special Trustee for American Indians).

1186. *But see, e.g.*, Christopher Barrett Bowman, *Comment, Indian Trust Fund: Resolution and Proposed Reformation to the Mismanagement Problems Associated with the Individual Indian Money Accounts in Light of Cobell v. Norton*, 53 CATH. U. L. REV. 543 (Winter 2004); Billee Elliot McAuliffe, *Comment, Forcing Action: Seeking to "Clean Up" the Indian Trust Fund: Cobell v. Babbitt*, 30 F. Supp. 2d 24 (D.D.C. 1998), 25 S. ILL. U. L.J. 647 (2001). For an analysis of congressional trust fund reform proposals, see Thomas V. Panoff, *Legislative Reform of the Indian Trust Fund System*, 41 HARV. J. ON LEGIS. 517 (Summer 2004).

1187. *The Reorganization of the Bureau of Indian Affairs: Hearing Before the Senate Comm. on Indian Affairs*, 108th Congress – 1st Sess. (May 21, 2003) (testimony of Keller George, United South and Eastern Tribes, President and Member of the Oneida Indian Nation) available at <http://indian.senate.gov/2003hrsgs/052103hrsg/george.PDF> (Senate Committee on Indian Affairs, 108th Cong. – 1st Sess., Hearing List).

at issue in *Cobell* relate only to IIM accounts, the amount of which pales in comparison to trust funds held by the government for tribes themselves.¹¹⁸⁸ The Chairman of the Quapaw Tribe of Oklahoma made this point in testimony before Congress. “I want to make it very clear,” Chairman John Berrey testified, “that Tribal claims and Individual claims in the *Cobell* case are very different and I want to reiterate the clear distinction.” He emphasized that “Tribal governments represent ninety percent of the Trust Corpus vs. ten percent represented by the *Cobell* class.”¹¹⁸⁹ The DOI itself has reminded Congress that at least sixteen tribes have already filed lawsuits seeking an accounting of tribal trust accounts.¹¹⁹⁰

XVIII. BIA REORGANIZATION

A. “As-Is/To-Be”

The DOI has shaken up the entire structure of Indian affairs in the wake of the *Cobell* rulings.¹¹⁹¹ BIA and OST leaders describe the goals and objectives of the Comprehensive Trust Management Plan as including the placement of both BIA and OST under the supervision of the Office of the Assistant Secretary – Indian Affairs; the implementation of a new land title records system to keep ownership records accurate and current; improved land and natural resource and trust fund asset management including a nation-wide plan for eliminating fractionated interests of land that are burdening the trust; promotion of tribal self-

1188. Currently, OST says it maintains approximately 1,400 accounts for 315 Tribal entities with assets exceeding \$2.5 billion and over 285,000 IIM accounts with assets of approximately \$480 million. Numbers are available at <http://www.doi.gov/ost>.

1189. *Potential Settlement Mechanisms for Cobell vs. Norton: Hearing Before the Senate Comm. on Indian Affairs*, 108th Cong. – 1st Sess., (May 30, 2003) (testimony of John Berrey, Chairman, Quapaw Tribe of Oklahoma, Vice-Chairman ITMA, Tribal Representative Leader “To Be” Trust Process Reengineering Team).

1190. *The Indian Trust Fund Lawsuit: Oversight Hearing Before the Senate Comm. on Indian Affairs*, 108th Congress – 1st Sess., (July 30, 2003) (statement of James Cason, Associate Deputy Secretary, Department of the Interior) available at <http://indian.senate.gov> (Senate Committee on Indian Affairs, 108th Cong. - 1st Sess., Hearing List). Since that testimony, additional tribal suits have been filed. See, e.g., Chet Brokaw, *S.D. Tribe Files Trust Lawsuit*, RAPID CITY JOURNAL, June 29, 2004 at <http://www.rapidcityjournal.com/articles/2004/06/29/news/state/top/news01.txt> (“The Oglala Sioux Tribe has filed a federal lawsuit that seeks to force the U.S. Interior Department to give a full accounting of land and money it is responsible for managing for the tribe.”).

1191. As noted by one tribal leader, “[t]he *Cobell* case served as a wake-up call to the Federal government about its gross mismanagement of trust assets and trust funds that Indians have known for over a hundred years but whose efforts to rectify or reform the system were met with a deaf ear. The *Cobell* case set off a chain reaction of events, including the reorganization at the Department of the Interior that will reverberate for decades to come.” *Reorganization of Trust Mgmt. at the Bureau of Indian Affairs and the Office of the Spec. Trustee*, supra note 29, (May 12, 2004) (testimony of Jim Gray, Principal Chief of The Osage Tribe).

governance and self-determination; and review and revision of trust business processes (known as “the As-Is/To-Be process”).¹¹⁹²

In testimony before the Senate Indian Affairs Committee, Special Trustee Ross Swimmer and Assistant Secretary Dave Anderson said the role of the Deputy Assistant Secretary – Indian Affairs has been expanded and the position renamed. The newly established office of the Principal Deputy Assistant Secretary for Indian Affairs has line authority over the Deputy Assistant Secretary for Management, the Director of the Office of Indian Education Programs, the Director of the Bureau of Indian Affairs, a new Deputy Assistant Secretary for Economic Development Policy and a new Deputy Assistant Secretary for Information Resources Management. In addition, administrative functions previously performed in a decentralized fashion at the central, regional and agency levels, have been consolidated under the new management structure.¹¹⁹³

Whereas, the BIA retains natural resource trust asset management, the management of the trust functions at the BIA regional and agency levels has been separated by creating the positions of Deputy Regional Director for trust services and Deputy Regional Director for Tribal Services. The Deputies will report to their Regional Director who, in turn, will report to the Director, BIA (formerly the Deputy Commissioner). A similar structure has been created at the agency level. Meanwhile, the OST continues to be responsible for the management of financial assets and certain reform projects and maintains its statutory oversight responsibilities with additional operating authority, including line authority over regional fiduciary trust administrators and fiduciary trust officers.¹¹⁹⁴

B. Tribes Oppose Stripping the BIA of Trust Responsibilities

Proposals to relieve the BIA of primary responsibility for the federal trust responsibility have been met with great resistance, in part due to fear that it is part of a larger effort to dismantle the BIA. The tribes also believe the administration has taken an office that was intended to oversee trust reform – the OST – and transformed it into an agency – the OTFM - that seeks to completely supplant the BIA. Testifying on BIA

1192. *Department of Interior Comprehensive Trust Plan*, *supra* note 51.

1193. *Trust Initiatives for the 21st Century: Hearing Before the Senate Comm. on Indian Affairs*, 108th Cong. - 1st Sess., (March 10, 2004) (statement of Ross O. Swimmer, Special Trustee for American Indians, and David W. Anderson, Assistant Secretary - Indian Affairs, U.S. Department of the Interior) available at http://indian.senate.gov/2004hrgrs/031004hrgr/031004wit_list.htm.

1194. *Id.*

reorganization before the Senate Committee on Indian Affairs, Tex Hall, President of the NCAI, insisted that tribal leaders “understand better than anyone that the Bureau of Indian Affairs needs to change” and that they “are not opposed to reorganization per se.” However, he added, “Tribal leaders have repeatedly emphasized that funding needed to correct problems and inefficiencies in DOI trust management must not come from existing BIA programs or administrative monies.”¹¹⁹⁵ Hall decried administration 2004 budget proposals under which large funding increases for the OST would be offset by deep cuts to BIA programs. The NCAI called for adequate new funding, meaningful standards for performance, locally based service delivery, and tribal involvement in establishing organizational structures and processes involving trust administration. Most of all, the NCAI demanded that OTFM be placed under the administrative control of the BIA.¹¹⁹⁶

In subsequent Senate testimony, the NCAI reiterated its charges that the OST continues to expand at the expense of BIA programs for education and other services, pursuant to the President’s 2005 budget. Hall charged:

Indian tribes are being forced to pay twice for the federal government’s mismanagement of our trust funds. First, when our trust funds and natural resources were grossly squandered and mismanaged, and now, when it is time to fix the system, the Department proposes to take the money out of other BIA programs and services.¹¹⁹⁷

Testifying on behalf of a Consortium of self-governance tribes in California, the Chairman of the Hoopa Valley Tribe also defended the BIA while criticizing the OST. Chairman Clifford Marshall said:

It does not seem possible that the limited staff and expertise of OST could be successful in assuming the responsibilities and control of the BIA’s thousands of employees who carry out trust resource management issues on a daily basis, or to address the problems associated with the vast diversities in Tribal/Federal relationships that have developed through decades of Tribal and BIA conflict resolution.¹¹⁹⁸

1195. *Trust Reform And Related Matters*, *supra* note 29, (May 21, 2003) (testimony of Tex G. Hall, President, National Congress of American Indians).

1196. *Trust Reform And Related Matters*, *supra* note 29.

1197. *Proposed Reorganization of Major Agencies and Functions Related to Indian Trust Reform Matters Within the Dep’t of the Interior*, *supra* note 29. (March 10, 2004) (testimony of Tex G. Hall, President, National Congress of American Indians).

1198. *Trust Reform And Related Matters*, *supra* note 29, (May 21, 2003) (testimony of Clifford

“[S]ince the creation of OST its primary mission appears to have been to either takeover or replace the BIA,” Marshall claimed, adding that “tribes across the Nation nearly unanimously demanded to keep the BIA system intact while fixing the resource management problems that need to be addressed.”¹¹⁹⁹

Similar sentiments were expressed by the President of the Oneida Indian Nation, testifying on behalf of twenty-four federally recognized Indian Tribes with 60,000 members in twelve southern and eastern states, the United South and Eastern Tribes (“USET”). Agreeing “that trust and other functions need to be separated,” Keller George testified that BIA re-organization had created “two competing organizations . . . OST and the BIA . . . (that) must compete against each other for authority, resources, and manpower.”¹²⁰⁰ USET has called for elevation of Indian Affairs authority to a Secretariat level within the government and demanded that “BIA’s funding should not be diminished in order to fund the trust efforts of the OST.”¹²⁰¹ The Navajo Nation expressed similar concerns about reorganization proposals.¹²⁰²

Testimony before the House Committee on Resources mirrored that in the Senate. Tribal witnesses were especially incensed that they felt effectively excluded from the reorganization process. Melanie Benjamin, the Chief Executive of the Mille Lacs Band of Ojibwe, expressed a typical tribal sentiment.

Initially, tribes were part of the process through a task force of which I was a member of. Although that task force attempted to develop a tribal solution, the Department of Interior suddenly dissolved the task force and proceeded with the trust reform process without any further tribal involvement. That action has since set the tone for the trust reform and reorganization as we see it playing out today, creating an atmosphere of distrust, sporadic paralysis, and uncertainty. Consequently, the Interior and BIA tribal consultation policy has become, with all due respect, meaningless to tribes who reasonably expect to have a voice in policy matters and decisions that affect us Although the BIA and the new Office of Special Trustee (OST) have conducted “consultation”

Marshall, Chairman, Hoopa Valley Tribe).

1199. *Trust Reform And Related Matters*, *supra* note 29, (May 21, 2003) (testimony of Clifford Marshall, Chairman, Hoopa Valley Tribe).

1200. *Trust Reform And Related Matters*, *supra* note 29, (May 21, 2003) (testimony of Keller George, United South and Eastern Tribes, President and Member of the Oneida Indian Nation).

1201. *Trust Reform And Related Matters*, *supra* note 29, (May 21, 2003) (testimony of Keller George, United South and Eastern Tribes, President and Member of the Oneida Indian Nation).

1202. *Proposed Reorganization of Major Agencies and Functions Related to Indian Trust Reform Matters Within the Dep’t of the Interior*, *supra* note 29 (March 10, 2004) (statement of Joe Shirley, Jr., President of the Navajo Nation, on Behalf of The Navajo Nation).

sessions throughout Indian Country on the trust reform and reorganization, the sessions are more accurately characterized as informational updates that tell tribes what changes have been made (as the result of prior policy decisions) and their effects upon tribes. From the tribal perspective, if a “consultation” takes place after the fact of a major decision that directly affects tribal interests, it is not a consultation. At most, it is an informational briefing This lack of meaningful tribal consultation is illustrative of the mixed messages that come from Interior and the BIA. On one hand, we are told that the BIA wants to work with tribes. On the other hand, the Department is overhauling an entire agency, and creating a new one in the process, without working with tribes at all.¹²⁰³

The Chairman of the Great Plains Tribal Chairman’s Association testified “that a majority of Indian tribes were against reorganization, not only because it was put into effect without meaningful tribal consultation but also because a ‘one size fits all’ approach to trust management reform is certain to fail.”¹²⁰⁴ Chairman Harold Frazier noted that several tribes had come up with their own proposals for trust reform designed to meet unique tribal needs and emphasizing self-governance. He reiterated concerns that trust reform may be code for centralizing BIA personnel and authority in Washington, while reducing the BIA’s local presence.¹²⁰⁵

The Principal Chief of the Osage Tribe agreed that “the determination of how to best manage trust obligations to tribes and Indians should focus on the most local level, BIA agencies.”¹²⁰⁶ He also expressed the fear that “[i]t remains to be seen whether the BIA and OST reorganization will refocus on providing better frontline trust services to tribes and Indians at the local level rather than hunkering down against potential trust liability.” Chief Jim Gray called on Congress to broaden its vision of trust reform, to include reforming the mineral leasing statute, addressing fractionation of Indian lands, promoting tribal self-governance, establishing a mechanism short of litigation to hold federal decision-makers accountable for failure to properly administer trust

1203. *Reorganization of Trust Mgmt. at the Bureau of Indian Affairs and the Office of the Spec. Trustee*, *supra* note 29 (May 12, 2004) (testimony of Ms. Melanie Benjamin, Chief Executive, Mille Lacs Band of Ojibwe).

1204. *Id.* (Testimony of Mr. Harold Frazier, Chairman, Cheyenne River Sioux Tribe, Chairman, Great Plains Tribal Chairman’s Association). The Great Plains Tribal Chairman’s Association represents sixteen tribes in the Great Plains region, encompassing the states of North Dakota, South Dakota and Nebraska. *Id.*

1205. *Id.*

1206. *Id.* (testimony of Jim Gray, Principal Chief of The Osage Tribe).

obligations, and appropriating sufficient funds to maintain the treaty and moral obligations of the United States to Indians and tribes.

The shameful federal policies of yesteryear that presumed Indian and tribal incompetence and sought to control Indian and tribal resources and decisions are still found in today's laws and therefore also the daily obligations of federal employees. The easy route for both Congress and the tribes is to scold the BIA and OST in harsh terms (which both usually deserve when it comes to trust management). The more difficult task is stepping back, taking a broader look at the problems, and seeking consensus from possible solutions.¹²⁰⁷

The DOI denies that it has excluded tribes from BIA reorganization or that it is seeking to replace the BIA with the OST. Special Trustee Swimmer contends that it was the tribes, not the Department, that "walked out" on the process. He stated that once a decision was made on reorganization, the BIA and the OST jointly held presentations to explain the trust initiatives to local and Area staff and to Tribal leaders.¹²⁰⁸ Mr. Swimmer's testimony also stoked tribal concerns about local delivery of services, noting that "consistent with the President's management agenda, administrative functions previously performed in a decentralized fashion at the central, regional and agency levels, have been consolidated under the management structure."¹²⁰⁹

The administration also contends that decreases in BIA budget lines have nothing to do with the ascension of the OST, but rather with the ineffectiveness of certain BIA programs, as demonstrated by an effectiveness rating tool used by the White House Office of Management and Budget ("OMB").¹²¹⁰ Some BIA and other Indian programs received low effectiveness ratings from the OMB, including Indian Law Enforcement, Indian School Construction, and Tribal Courts. BIA programs receiving higher ratings include the Indian Forestry Program, Indian School Operations and Tribal Land Consolidation. Overall, however, BIA program ratings do not appear to differ dramatically from effectiveness ratings given to other Interior programs, nor do line items in the Presidential Budget routinely reflect program ratings.¹²¹¹ The tribal outcry has at least moderated the reorganization juggernaut's impact on

1207. *Id.*

1208. *Id.* (statement of Ross O. Swimmer, Special Trustee For American Indians and Aurene Martin Principal Deputy Assistant, Secretary - Indian Affairs U. S. Department of the Interior).

1209. *Id.*

1210. OMB PART, *supra* note 350.

1211. OMB PART, *supra* note 350, at 2.

Indian preference hiring, however. In March of 2004, responding to criticism from tribal officials, Interior reversed a decision that would have eliminated Indian preference for dozens of BIA appraisal staff.¹²¹²

C. BIA & OTFM: "Internecine Warfare"

The battle between OST and the BIA has not gone unnoticed by Congress, or for that matter, by the *Cobell* court. Judge Lamberth has characterized relations between the OST and the BIA as "internecine warfare," criticizing the "bunker mentality" and lack of cooperation alleged to exist among the different agencies of Interior.¹²¹³ Meanwhile, at the urging of Congress, the General Accounting Office ("GAO") has begun a wide-ranging investigation of the OST.¹²¹⁴ The Chairman of the Senate Indian Affairs Committee, Sen. Ben Nighthorse Campbell, said he has received numerous complaints about the reorganization process, including "forced retirements, unfair firings, nepotism, mismanagement of funds, ethics violations and civil rights violations."¹²¹⁵

Amid such rancor, Congress ultimately rejected much of the President's BIA/OST reorganization budget. The House of Representatives passed a FY 2005 budget of \$19.5 billion for the Interior Department that restores some of the cuts the administration had proposed for Indian programs. The bill restored a \$65.5 million cut to the construction of new schools and a \$50.6 million cut for new IHS clinics and hospitals. Overall, the BIA is funded at \$2.3 billion, \$81 million above the White House request. Significantly, the bill reduces funding for the OST by \$51.4 million.¹²¹⁶

1212. See *Swimmer to retain control of Indian appraisals*, Apr. 6, 2004, available at <http://indianz.com/News/archive/001587.asp>; see also *OST to Contract with NBC to Manage its Appraisal Program, Indian hiring preference will continue under program*, PEOPLE LAND & WATER, June 2004, at 45. (PEOPLE LAND & WATER the DOI's employee news magazine).

1213. *Cobell v. Norton*, 226 F. Supp. 2d 163, 172, n.5 (D.D.C. 2002) ("Monitor Order" and "Special Master-Monitor Order") (citing the Seventh Report of the Court Monitor), *vacated by, in part, remanded by Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003).

1214. See *Johnson promises "meaningful" investigation of OST*, Indianz.com, June 21, 2004, available at <http://www.indianz.com/News/2004/003036.asp>. Senator Johnson's letter requesting the General Accounting Office to investigate OST may be found at www.johnson.senate.gov. At an oversight hearing on the No Child Left Behind Act (NCLB), the chairman and the vice-chairman of the Senate Indian Affairs Committee agreed that a GAO investigation is needed. See *Complaints prompt probe into BIA education*, Indianz.com, June 17, 2004, available at <http://www.indianz.com/News/2004/002973.asp>.

1215. *Complaints prompt probe into BIA education*, Indianz.com, June 17, 2004, available at <http://www.indianz.com/News/2004/002973.asp>.

1216. HOUSE RPT. NO. 108-542, at 85-86- Department of the Interior and Related Agencies Appropriation Bill, 2005, available at <http://www.whitehouse.gov/omb/budget/fy2005/budget.html> for complete budget details.

XIX. CONCLUSION

Declaring that there is a crisis in the persistence and growth of unmet needs, the U.S. Commission on Civil Rights recommends that Federal agencies take urgent action to more fully assess the extent of unmet needs in Indian Country, to increase efficiency and effectiveness in the delivery of federal services, to establish perennial adequate funding, and to promote tribal self-governance.¹²¹⁷ These goals mirror those voiced over recent decades by most tribal advocates.

The Commission itself has taken a significant step forward in helping to identify the unmet needs of Native Americans. Whether adequate funding will be forthcoming from Congress is in doubt, however, considering that competing interests and priorities have rarely loomed so large, as tax cuts and war spending add to the greatest federal budget deficit in history.¹²¹⁸ However, there is a broad consensus on the remaining goals of a more efficient and effective federal services and expanding the concept of tribal self-governance.

Tribes undoubtedly will assume a greater role not only in administration of federal and tribal trust resources but also in resolving the vexing issues of trust reform and reorganization of the BIA. Tribal voices are increasingly making themselves heard, partly due to newfound prosperity on the part of a relative few, partly through greater expertise and collective lobbying, and partly by holding the moral high ground.

The editors of the New York Times saw even Congressional consideration of a long overdue apology¹²¹⁹ as a bow to the growing

1217. A QUIET CRISIS, *supra* note 46, at 110-19.

1218. See, e.g., Jonathan Weisman, *Concerns About War, Deficit May Curb Tax Cuts*, WASHINGTON POST, March 17, 2003, at A4 (reporting that eleven House Republican moderates sent a letter to House Speaker J. Dennis Hastert objecting to a budget resolution “that fails to meet the needs of our domestic priorities, while reducing taxes by \$1.4 trillion.”); Jonathan Weisman, *2006 Cuts In Domestic Spending On Table*, WASHINGTON POST, May 27, 2004, at A1 (reporting that the White House has put government agencies on notice that if President Bush is reelected, his budget for 2006 may include spending cuts for virtually all agencies in charge of domestic programs, including the Interior Department); T. Christian Miller, *Pentagon Waste in Iraq May Total Billions, Investigators Say*, L.A. TIMES, June 16, 2004, at A12. Republicans as well as Democrats are rebelling against the stranglehold the tax cuts, in particular, have placed on the budget process. See, e.g., Jonathan Weisman, *Budget Impasse Reflects GOP Schism*, WASHINGTON POST, June 30, 2004, at A1.

1219. On May 6, 2004, Sen. Sam Brownback of Kansas introduced “[a] bill to acknowledge a long history of official depredations and ill-conceived policies by the United States Government regarding Indian Tribes and offer an apology to all Native Peoples on behalf of the United States.” S.J. Res. 37, 108th Cong. There are increasing calls for more open acknowledgement of the harms done to Indian people by the federal government, many suggesting more than a simple apology. See, e.g., William Bradford, *“With a Very Great Blame on Our Hearts”*: *Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1 (2002-2003); Rose Weston, *Facing the Past, Facing the Future: Applying the Truth Commission Model to the Historic Treatment of Native Americans in the United States*, 18 ARIZ. J. INT’L & COMP. L. 1017 (2001);

political muscle of tribes.

Native Americans' power is considerable in tribal bases like South Dakota, where their turnout was crucial in electing Senator Tim Johnson in 2002; in Alaska, where they are 16 percent of eligible voters; and in tight presidential states like Arizona, New Mexico and Nevada. Severe health, education and economic troubles still bedevil the reservations, despite the casino riches of a minority. Accordingly, the tribes must aim for more than an apology as they pursue ambitious voter-enrollment programs. An official apology is indeed words on paper. But approval by Congress would be an acknowledgment of modern tribal power, especially if the president presented it this September at the opening of the National Museum of the American Indian in Washington.¹²²⁰

The growing tension between greater tribal self-governance and the continuation of the federal trust responsibility raises important questions for the future of federal Indian policy. Their resolution may present an opportunity to remedy an equally difficult dilemma: the persistent conflict between aggressive enforcement of the federal trust responsibility and competing government interests.

Lindsay Glauner, *The Need For Accountability And Reparation: 1830-1976 The United States Government's Role In The Promotion, Implementation, And Execution Of The Crime Of Genocide Against Native Americans*, 51 DEPAUL L. REV. 911 (2002).

1220. *The Long Trail to Apology*, Opinion, N.Y. TIMES, June 28, 2004, at A18.